SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 16

WILLIAM L. AUSTIN, PETITIONER,

vs.

KENTUCKY.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF MC CRACKEN COUNTY, COMMONWEALTH OF KENTUCKY

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[fol. 1-2]

IN THE McCRACKEN COUNTY COURT

Complaint—October 11, 1963

The affiant, Mrs. Catherine Wathen, 624 No. 5th Street, being duly sworn says that on the 28th. day of September 1963, in McCracken County, Kentucky, William L. Austin and Mrs. Ruth Austin—d/b/a Readmore—117 South 5th Street did unlawfully with knowledge of the contents or character sell, offer to sell, have in possession with intent to sell and offer to sell two magazines, to-wit: Volume 1, No. 38 of a publication known as "Spree", and Volume 2, No. 6 of a publication known as "High Heels", both of said publications being obscene and containing obscene pictures and writing or printed material of an indecent character.

Subscribed and sworn to before the undersigned Judge by the complainant this the 11th. day of October, 1963.

Catherine Wathen, Complainant.

In the McCracken County Court

Warrant or Summons—October 11, 1963

Commonwealth of Kentucky,
To All Peace Officers in the Commonwealth, ss.

The undersigned Judge, having considered the complaint herein, does hereby command you to (summons to appear at formal hearing) William L. Austin and Mrs. Ruth Austin and bring said person or persons forthwith before the Judge of the County Court of McCracken County, Kentucky, (or if he be absent or unable to act, before the nearest available magistrate), to answer the above complaint made by Mrs. Catherine Wathen charging said person or persons with the offense of offering obscene literature for sale.

Formal hearing will be held before the McCracken County Court on the 14th day of October, 1963 at the hour of 2:00 P.M., and you will have then and there this writ, with due return how you have executed it. The foregoing complaint was sworn to before me and this writ was issued in McCracken County, Kentucky, this the 11th day of October, 1963.

Roy Stewart, Judge, McCracken County Court.

Witnesses: Margaret Pruitt—Readmore, Pat McWaters.

[fol. 3]

IN THE McCRACKEN COUNTY QUARTERLY COURT

At a Special Session of Said Court Held November 6, 1963.

Hon. Roy Vance, Trial Commissioner, Presiding.

COMMONWEALTH OF KENTUCKY, Plaintiff,

vs.

"Offering obscene literature for sale"

WILLIAM L. AUSTIN and
MRS. RUTH AUSTIN, Defendants.

JUDGMENT—November 6, 1963

Commonwealth of Kentucky was represented by the County Attorney. Then came the defendants who were represented by counsel, and both parties announced ready for trial, and the prosecution being submitted to the Court, and on motion of the County Attorney, action was dismissed as to the defendant, Mrs. Ruth A. Austin.

The following jury was empaneled and accepted by the Commonwealth and defendant: Mrs. Thomas Whittemore, Paul Bowland, Raymond Wallace, Herman Graham, Dorothy Abell and Connie Neal, Jr.

Evidence was presented to both Commonwealth and defendant, and the jury was instructed as to law. The jury returned the following verdict: "The jury finds William L. Austin, guilty as charged." Punishment is fixed at a fine of $100.00 /s/ Herman Graham, Foreman of jury."

Wherefore it was adjudged by the Court that the Commonwealth of Kentucky do recover of the defendant, William L. Austin, the sum of $100.00 and costs.

[fol. 4] Roy Vance, Trial Commissioner. Approved by: Roy Stewart, Judge.

Clerk's Certificate (omitted in printing)..

[fol. 7]

IN THE MCCRACKEN CIRCUIT COURT

Criminal Action #9443

COMMONWEALTH OF KENTUCKY, Plaintiff,

vs.

WILLIAM L. AUSTIN, Defendant.

MOTION TO SET ASIDE CONVICTION AND TO DISMISS COMPLAINT—Filed February 24, 1964—Re-filed February 27, 1964

Defendant moves the court that the conviction and fine rendered against him in the McCracken County Court, which conviction and fine has been appealed to this court, be set aside and the complaint against him dismissed.

As grounds for his motion defendant states that the Kentucky Revised Statute under which he was convicted and

[File endorsement omitted]

fined, and under which the complaint against him was brought, KRS 436.100, is unconstitutional as contrary to, in conflict with, and in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States of America. As further grounds for his motion defendant states that the publications in this case are protected by the First and Fourteenth Amendments to the Constitution of the United States and moves that the complaint be dismissed as the prosecution of same contravenes the protection afforded him under the First and Fourteenth Amendments to the Constitution of the United States.

Chas. A. Williams, Broadway at Seventeenth, Paducah, Kentucky, Attorney for Defendant.

Proof of Service (omitted in printing).

[fol. 8-35]

IN THE MCCRACKEN CIRCUIT COURT

Criminal Action #9443

[Title omitted]

MOTION TO POSTPONE TRIAL—Filed February 24, 1964—Re-filed February 27, 1964

Defendant, pursuant to Rule 9.04 of the Kentucky Rules of Criminal Procedure, hereby moves the Court that the trial in this case, set for Thursday, February 27, 1964, be postponed. As grounds for his motion defendant states that the law involved in this case is in considerable uncertainty due to new rules laid down by the Supreme Court of the United States. Defendant further states that the constitutional questions involved in this case as raised by defendant's motion to dismiss the complaint in this action are important and must be extensively briefed and argued.

[File endorsement omitted]

Defendant also states that no prejudice or hardship will result to the Commonwealth of Kentucky if the trial in this case is postponed.

Defendant further states that due to personal reasons his counsel has not had an opportunity to adequately brief the questions involved.

Chas. A. Williams, Broadway at Seventeenth, Paducah, Kentucky, Attorney for Defendant.

Service Certificate (omitted in printing).

[fol. 37]

IN THE MCCRACKEN CIRCUIT COURT

COMMONWEALTH OF KENTUCKY, Plaintiff,

VS

WILLIAM L. AUSTIN, Defendant.

Hon. C. Warren Eaton, Judge.

TRANSCRIPT OF EVIDENCE—February 27 and 28, 1964

APPEARANCES: Hon. W. Pelham McMurry and Hon. Albert Jones For the Commonwealth. Hon. Chas. A. Williams and Hon. James G. Apple For the Defendant.

[fol. 38] The transcript of the evidence given at the trial of the above-styled action held on February 27 and 28, 1964, at the McCracken County Courthouse with Honorable C. Warren Eaton, Judge of the Second Judicial District of Kentucky, presiding. The Commonwealth was represented by Hon. Albert Jones, Commonwealth's Attorney for the Second Judicial District of Kentucky, and Hon. W. Pelham McMurry, County Attorney of McCracken County, Kentucky. The defendant, William L. Austin, was represented by his counsel, Hon. Chas. A. Williams and Hon. James G.

Apple. Following selection of the jury and statement to the jury on behalf of the Commonwealth, the Defendant having reserved his statement until the end of plaintiff's evidence, testimony was presented by the Commonwealth.

It was stipulated by the parties prior to the introduction of any evidence that the defendant, William L. Austin, was the owner and operator of Readmore news stand on September 28, 1963, prior to and since that time.

The Commonwealth first called the witness, KATHERINE WATHEN, who, being duly sworn, testified as follows in response to interrogation by Mr. McMurry:

1. Please state your name and address.
[fol. 39] A. Katherine Wathen; 624 North 5th Street.

2. In Paducah, Kentucky?
A. Yes sir.

4. I will ask you if you know of an establishment known as Readmore?
A. Yes sir, I do.

5. Where is that establishment located?
A. On North Fifth Street between Kentucky Avenue and Broadway.

6. That's here in Paducah, McCracken County, Kentucky?
A. Yes sir, it is.

7. Mrs. Wathen, have you ever been in the Readmore news store?
A. Yes, I have.

8. I will ask you if you were there on the 28th day of September, 1963?
A. Yes sir, I was.

9. Just tell the jury, if you will, what you did when you got there.

A. Well, I went in and asked for four specific magazines, two of them the saleslady said they were temporarily out of, and—

Mr. Williams: We object to what the sales lady said.

The Court: Overruled.

A. She said they were out of two of them. Two of them they had and I purchased them.

10. Do you recall the names of the magazines that you purchased?

A. Yes sir, it was Spree and High Heels.

11. I hand you here a publication named High Heels, known as Volume 2, No. 6. It has been marked Exhibit 1, Commonwealth; I will ask you if you can identify that.

A. Yes sir, this is the magazine I purchased.

12. On that occasion?

[fol. 40] A. On that occasion.

13. And how much did you pay for that magazine?

A. A dollar ($1.00), plus tax, three cents tax.

Mr. McMurry: I would like for this to be admitted into evidence as Commonwealth's Exhibit No. 1.

The Court: Let it be received in evidence as a part of the testimony of this witness.

14. I hand you here a second magazine called Spree, No. 38, is the number that is on it. Do you recognize that?

A. Yes sir.

15. What magazine is that?

A. This is Spree. I also purchased this magazine for the same amount, a dollar ($1.00) plus tax.

Mr. McMurry: If you will permit me, I would like to have this marked Exhibit No. 2 for the Commonwealth.

The Court: Let the reporter mark it Exhibit 2 for the Commonwealth, and let it be received in evidence as a part of the testimony of this witness. (Exhibit so marked)

16. Mrs. Wathen, state whether or not these magazines are exactly in the same condition as they were when you purchased them.

A. They are, with the exception of at the time I purchased those magazines they were stapled together.

17. That is, staples running through the magazines so that you couldn't thumb through them?

A. That's right.

18. But outside of that they are in the same condition?

A. Yes sir.

19. Now Mrs. Wathen, what is the layout of the Readmore news stand? How is it designed?

A. Well, there are bookshelves of paper back books. [fol. 41] There are magazine racks filled with magazines, and also there are places for cards, post cards and all occasion cards, and also there are newspapers there.

20. Where were these magazines found in the store?

A. They were found on a rack behind the cashier's stand.

21. You mean to say then that there were several magazines located behind the cashier's stand?

A. Yes sir.

22. Is that stand so located that any and everybody can get back there and readily find them?

A. Well, they can see the magazines. They cannot go behind the racks themselves. They ask for the magazines by name.

23. I see. Now the other magazine racks I presume everybody can go in there and look at?

A. Yes sir.

24. And examine the magazines?

A. Yes sir.

25. And these particular magazines were segregated back behind that counter?

A. Yes sir.

26. Had you been in the Readmore news stand prior to that occasion?

A. Yes sir, I had.

27. And you have been in there since?

A. Yes, I have.

28. When did they put that rack in there that's behind the cash register counter?

A. Approximately late last summer.

29. Late or early last summer?

A. Early last summer, a year ago, in 1963.

30. Now while you were in the news stand on that occa-
[fol. 42] sion, did you see anybody there that you know?

A. Yes, I did, Mrs. Patsy McWaters was present at the time.

31. Did she see you purchase these magazines, as far as you know?

A. Yes sir, I think she did.

32. Mrs. Wathen, do you know—strike that. It has been stipulated here that Mr. Austin owned and operated Readmore news stand. Do you know who it was that waited on you on this occasion?

A. Yes, I knew that lady's name at the time. It slips my mind now.

33. What I am getting at, was it or not Mr. Austin himself?

A. No sir, it was not.

34. One of his employees then?

A. That's right.

35. All right, did she receive your money?

A. Yes sir.

36. And handed you the magazines?

A. That's right.

37. Do you know where Mr. Austin acquired those two particular magazines?

A. He got those from Basin News Company.

38. How do you know that?

A. From his testimony in the County Court.

Mr. Williams: We object to that.

The Court: Overruled.

39. You say he testified in County Court that he—

Mr. Apple: We object, your Honor. This is a trial de novo.

The Court: She can tell what he said. A statement against interest.

Mr. Williams: We move that the jury be discharged.

The Court: I will overrule the motion.

40. Mrs. Wathen, you say Mr. Austin admitted that he [fol. 43] got these two magazines from Basin News Company?

A. Yes sir.

41. Do you know who owns and operates Basin News Company?

A. Yes sir, Mr. Austin.

42. The same defendant, Mr. William L. Austin?

A. Yes sir.

43. After the purchase of these two magazines, what did you do with them?

A. I took the magazines home and read them, portions of them, practically all of it, and then I brought them to the courthouse.

44. And that's when the summons was issued in this case?

A. Yes sir.

Mr. McMurry: You may ask her.

Cross examination.

By Mr. Williams:

1x. Mrs. Wathen, you had been to Readmore news stand prior to that, prior to September 28th and looked at these two magazines, hadn't you?

A. I had been to Readmore and looked at several magazines.

2x. Among them these two?

A. I don't remember whether these two, but of this type magazine.

3x. Did you look over behind the counter?

A. At that time prior to the time I purchased these magazines, all of the magazines were out in the open. There were none behind the counter.

4x. How long was it prior to September 28th that you made your examination of Readmore news stand?

A. Back in the early summer, and I also purchased other magazines in Readmore.

[fol. 44] 5x. Now how many times had you been in Readmore and bought this type of magazine before?

A. Approximately twice.

6x. Who did you buy them for?

A. Myself.

7x. You had not seen these two magazines I take it the prior times you had been there?

A. Well, it could have been. There was a variety of magazines. I don't recall the names of all the magazines.

8x. On this occasion you just asked for four magazines by name?

A. Yes sir.

9x. And among them was Spree and High Heels?

A. Yes sir.

10x. And where did you get the names of those two magazines?

A. One of the names came from Mr. Copeland in Mayfield and the other magazine, I had seen the magazine prior to the time I had purchased it. I saw it at someone else; house, and I decided to go back and buy a newer issue to read.

11x. To read?

A. Myself.

12x. Did you buy it to read?

A. Yes, I did.

13x. How long have you been reading High Heels and Spree?

A. I have never read them before, sir.

14x. Have you read Playboy?

A. No sir, I have seen the magazine and thumbed through it, but I haven't read it through.

15x. Have you read Cavalier and Dude?

A. I have done the same thing. I have examined the magazines and read portions of them, not the complete magazines.

[fol. 45] 16x. Do you consider them the same type as these two?

A. I consider them not as bad. They are along the same line but I do not consider them as bad as these two magazines.

17x. Now as a matter of fact, you went down there just to see what type of material was being sold, didn't you, Mrs. Wathen?

A. Yes, I did.

18x. You didn't go to get books to read?

A. Well, the idea of buying a book, Mr. Williams, is to read.

19x. As a matter of fact, you had sent one of the children down there before and attempted to have them buy them, didn't you?

Mr. McMurry: Object.

A. No sir.

The Court: I will sustain the objection.

20x. I will ask you if it isn't a fact that you were furnished the names of these magazines by an organization by the name of Citizens for Decent Literature?

A. No sir.

21x. You are a Catholic, aren't you?

A. Yes, I am.

22x. And you belong to the censorship organization known as the Legion of Decency?

A. No sir, I do not.

23x. Mrs. Wathen, after you read and examined these magazines did you make at any time any complaint to Mr. Austin or to anyone in his employ about them?

A. No, I did not.

24x. Were you present at a meeting at the First Presbyterian Church that I attended and a number of ministers attended and Father Field and Mr. McMurry—(interrupted by witness).

A. Yes I was.

[fol. 46] 25x. (Continuing with Q24): In which we asked for a list that you all thought was obscene?

Mr. McMurry: I object, if the Court please. Don't answer that, Mrs. Wathen.

The Court: I am sorry, I didn't get the question.

Mr. McMurry: He is asking her if she attended some meeting after the trial down stairs where—read the question back.

The Reporter: (Reading) Were you present at a meeting at the First Presbyterian Church that I attended and

a number of ministers attended and Father Fields and Mr. McMurry in which we asked for a list of material you thought obscene?

The Court: I will sustain the objection. I don't think that is material in the trial of this case.

Mr. Williams: I would like to have her answer by way of avowal.

Avowal Answer by Witness: I don't remember whether we had a list or not. I don't recall a list being asked for.

Question by Avowal: Were you present?

Avowal Answer by Witness: Yes, I was present at that meeting.

26x. Do you know, Mrs. Wathen, whether you or anyone in your group has ever furnished to Mr. Austin or to any employee of Readmore a list of magazines or books that you consider to be obscene?

Mr. McMurry: I object. Now she is not a member of any group. She has said that.

The Court: I will sustain the objection.

Mr. Apple: This is before, this is before—

The Court: I will sustain the objection.

Mr. Williams: I will ask you to answer by way of avowal. Will you lean over here and speak to the reporter out of the [fol. 47] hearing of the jury.

Answer by Avowal: I don't know what he means by "my group".

Question by Avowal: Well, have you?

Answer by Avowal: I haven't personally.

Question by Avowal: And no one to your knowledge has?

Answer by Avowal: Has ever?

Question by Avowal: You said you don't know what I meant by your group, and you said that you had not. No one else has that you know about, is that correct?

Answer by Avowal: Yes, I do know the ministers had presented Mr. Austin with the names of some literature that they objected to.

Question by Avowal: What ministers?

Answer by Avowal: I believe they testified they did not furnish him a list.

Mr. McMurry: Well now that is just arguing with the witness. You have asked her the questions.

27x. You do know that those books were not available to be sold to minors, don't you?

Mr. McMurry: I object.

The Court: I will sustain the objection.

28x. Were there any other magazines stapled when you were in the store?

A. Yes sir, the ones behind the cashier's stand were stapled.

29x. Do you know if Life Magazine was stapled?

A. No sir. Life Magazine was not behind the cashier's stand.

30x. You were only interested in those behind the cashier's stand?

A. No sir, I observed all of the magazines in the store.

31x. Then you had never made any complaint to Mr. [fol. 48] Austin or anyone there about these magazines or any magazines, had you?

A. Personally had I?

32x. Yes ma'm.

A. No sir.

33x. You went and bought the magazines and took them home and then you went and got this woman, is that correct?

A. Yes sir.

34x. As a matter of fact, you called Mrs. McWaters and told her that you were going down there and buy these magazines and you wanted her to be there so she could see you buy them, didn't you?

A. I told her I was going to Readmore and I would like for her to be present while I was there.

35x. Did you tell her what you were going for?

A. I told her I was going to buy magazines. She had no idea about the names or nothing.

36x. She knew your purpose, didn't she?

A. Probably you will have to ask her that.

37x. You called her so she could be a witness for you in court, didn't you?

A. Yes, I did.

38x. I will ask you, you were present at the other hearing, weren't you?

A. Yes, I was.

39x. And did you not hear Mr. Austin testify that he did not know these two magazines were in his store?

A. I heard him. I didn't believe him. I heard him.

40x. Well I understand that you didn't believe him. But that is what he testified, wasn't it?

A. That is what he testified.

[fol. 49] Mr. Williams: That's right. That is all.

Redirect examination.

By Mr. McMurry.

1r. You have testified that the special rack behind the cashier's counter was put in there in the early summer of 1963. Do you know who caused it to be built and who moved the magazines off of the main racks and put them back behind the counter?

Mr. Apple: We are going to object to that. I don't see how she could know.

The Court: If she knows, she can testify.

Mr. McMurry: She heard the testimony downstairs.

Mr. Apple: But this is a trial de novo.

The Court: She is not testifying as to what another witness said.

Mr. Williams: That is what Mr. McMurry is asking her.

The Court: She cannot testify as to what she heard another witness say other than the defendant.

Mr. Williams: She can testify in rebuttal to Mr. Austin after he has testified, but she hasn't any right to testify as to this now.

The Court: I will overrule the objection, if she knows.

2r. Do you know from Mr. Austin's statements made in your presence on the occasion of the hearing downstairs why the magazines, or who moved the magazines from the regular shelves and put them back behind the counter?

A. Yes sir, he testified that there had been complaints of children reading and buying those magazines from the ministers. The ministers went to Mr. Austin and asked him to please do something about them and he removed the magazines.

3r. Go ahead.

A. Mr. Austin then proceeded to build the rack and put [fol. 50] these stapled magazines behind the cashier's stand, as well as I can remember, to my knowledge that is why the rack was made, that's who did it, Mr. Austin.

Mr. McMurry: That is all.

Recross examination.

By Mr. Williams:

1x. Just a minute, Mrs. Wathen, I have here a transcript of what was testified to below—

A. I said to my knowledge, as I remember it.

2x. Yes ma'm, you are testifying to your memory and you said there had been complaints to Mr. Austin to remove the magazines, didn't you?

A. Complaints about the magazines and children getting them.

3x. As a matter of fact, wasn't it testified that they asked him if he could do something about them so far as children

seeing them and if he didn't move them back there so children couldn't see them? Is that correct?

A. I don't remember exactly, Mr. Williams.

4x. That's right, but you are testifying exactly, aren't you, Mrs. Wathen?

A. No, I told Mr. McMurry to my knowledge and as far as I can remember that was what was said and that is what I am telling you. That's the best I can do. I don't remember perfectly word for word.

5x. All right. And you also heard Mr. Simpson testify, didn't you?

A. Yes, I heard him.

6x. And you heard Mr. Simpson testify—

Mr. McMurry: I object to any question about what Mr. Simpson testified.

[fol. 51] The Court: I will sustain the objection as to what Mr. Simpson testified to. He is not a party to this action.

7x. What other kinds of books are sold at Readmore?

A. Oh, he has some very good books. He has Bibles, best sellers and a variety of very good books, as well as this kind of magazine, and pocket novels.

8x. Do you keep up with best seller lists, Mrs. Wathen?

A. No sir, I don't.

9x. Did you ever see "Tropic of Cancer" for sale down there?

Mr. McMurry: I object.

The Court: I will sustain the objection.

10x. Do you know that that was on the best seller list?

Mr. McMurry: Object.

The Court: I will sustain the objection.

The Commonwealth then called to the stand, MRS. PATSY MCWATERS, who after being sworn, testified as follows in response to interrogation by Mr. McMurry?

1. Will you state your name and address?
A. My name is Patsy McWaters, 2323 Seneca Lane, Paducah, Ky.

2. Do you know the witness that has just left the stand, Mrs. Katherine Wathen?
A. Yes, I do.

3. I will ask you if you saw her on the 28th day of September of this year in Readmore news stand?
A. Yes sir.

4. How did you happen to be there on the same occasion?
A. She called me and asked me if I would come down to Readmore, that she would be there.

[fol. 52] 5. You knew she was going to make a purchase?
A. Yes, I did.

6. Mrs. McWaters, did you then go to Readmore news stand?
A. Yes, I did.

7. While you were there did you see Mrs. Wathen?
A. Yes, I did.

8. What did you see happen there, go on?
A. I saw Mrs. Wathen go up to the cash register and ask the sales clerk for magazines which were behind the cash register and Mrs. Wathen then purchased two magazines from the clerk at Readmore and left the store, and I saw this happen.

9. I hand you here a magazine, Exhibit No. 1 for the Commonwealth, and ask you if that is one of the magazines she purchased?
A. Yes sir.

10. And Commonwealth's Exhibit No. 2, is that also one?
A. Yes, that's one.

Mr. McMurry: I would like to pass these around and let the jury—

Mr. Williams: I object.

The Court: I think it would be best to wait until they go to the jury room. It will take some time.

Mr. McMurry: I don't want to hold up the trial or anything like that. I thought they might be thumbing through them and looking through them.

Mr. Apple: They will be listening to the testimony.

Mr. McMurry: Well, while they are listening to the testimony. They can see what is being testified about. That is up to the Court.

The Court: I believe I will wait a while. You can go ahead with your examination. We will have a recess before long.

[fol. 53] Mr. McMurry: I have no further questions.

Cross examination.

By Mr. Williams:

1x. Now you had been to the Readmore news stand a number of times?

A. Yes sir.

2x. Both before that occasion and since?

A. Yes.

3x. And you too belong to the Catholic Church?

A. Yes.

Mr. Williams: That is all.

Redirect examination.

By Mr. McMurry:

1r. Do either one of you belong to an organization known as Citizens for Decent Literature or any other organization about decent literature?

A. I do not.

Recross examination.

By Mr. Williams:

1x. But you and Mrs. Wathen have worked with Father Fields on literature—

Mr. McMurry: Object.

The Court: I will sustain the objection.

Mr. Williams: I have no further questions.

The Court: At this time, ladies and gentlemen of the jury, we will have a recess. Let me admonish you not to discuss the case with anyone or permit anyone to discuss it with you. Do not discuss it among yourselves or form or express an opinion as to how it should be decided until submitted to you for that purpose. Be back in the courtroom in ten minutes.

[fol. 54] Following the recess the jury returned to their places and the Commonwealth called to the stand Rev. Herbert Simpson, who, after being sworn, testified as follows in response to questions by Mr. McMurry?

1. State your name and address to the jury, please.

A. Herbert Simpson, 2400 Jefferson, Paducah, Kentucky.

2. I believe you are a minister, are you not?

A. Right, I am pastor of the First Christian Church.

3. The First Christian Church here in Paducah?

A. In Paducah.

4. How long have you been a resident of Paducah, McCracken County, Kentucky?

A. Since January of 1961.

5. In the summer and late spring of 1963 did you hold any position with the Ministerial Association?

A. Yes sir, I was chairman of their committee on moral and social welfare.

6. And can you say which ministers in the Paducah area were members of that committee in the late spring of 1963?

A. Yes sir, Dr. Frank Brown, minister of the First Presbyterian Church, Robert Solomon, minister of Trinity Baptist Church, and C. K. Henry, who is the minister, I believe of St. James A. M. E.

7. Preacher, did your committee on social welfare—is that what you called it?

A. Moral and social welfare.

8. Moral and social welfare, have any meetings in the month of May, 1963?

A. Yes, we did, we had a meeting in the office of our [fol. 55] church. First Christian.

9. And can you say who was present outside of the ministers?

A. Yes sir, Mr. Austin and his son who is in business with him in Basin News.

10. The defendant, William L. Austin, was there?

A. Right.

11. Now was he there of his own motion and design or on the invitation of the ministers?

A. He was there by invitation.

12. Now what was the purpose of the ministers extending to him the invitation to be at that meeting?

A. We had had a meeting sometime before at which the matter of obscene literature had been discussed and presented before us, and shortly after the meeting Mr. Austin came to my office and discussed the matter with me. He was very courteous and offered to be helpful in any way he could, and I thought it would be good for him to speak to the entire committee, and so I arranged the meeting at which he and his son were present.

13. And at that time was or was not there any complaint made about the reading material on his news stand here in—the establishment known as Readmore?

A. There were complaints that had come to us as pastors through this committee of the Paducah Area Ministerial Fellowship.

Mr. Williams: I object and move that the jury be instructed not to consider that.

The Court: I think perhaps the purpose of the testimony is to show knowledge and for the purpose of showing knowledge, if it does so, I will permit the witness to answer.

14. Were the objections that you presented to Mr. Austin [fol. 56] on that occasion directed to any particular book or magazine or any class or character of magazine?

A. No, we were talking about obscene literature in general.

15. Were you talking about a particular class of magazine?

A. Yes, I guess you would describe it as these girlie magazines, this type of thing.

16. I see. I hand you two publications here that are in evidence in this trial and ask you if those are the same character and class complained of by the ministers to Mr. Austin on that occasion?

Mr. Apple: Just a minute, this is not a character or class magazine. This is on these two, isn't that right?

Mr. McMurry: No sir, you are absolutely wrong. Get your statute.

Mr. Apple: You wouldn't let us ask Mrs. Wathen about other magazines because they weren't in issue.

The Court: I will let the jury consider it for the purpose of whether or not he had knowledge of the class or character.

Mr. Apple: Note out objection.

17. Reverend Simpson, while Mr. Austin was there on that occasion state whether or not he made a statement to you regarding his own censorship of the magazines in his establishment?

A. Yes sir, he did. He indicated that there were many of this type of magazine that he had cleated or stapled together so that they could not be thumbed through by either teenagers or adults, and he had done this of his own volition to protect this type of thing from under aged people, and we appreciated this knowledge coming to us. This is why we had him before us, to see if any of this sort of thing was being done or what rules or standards he was [fol. 57] maintaining in the store.

18. Now Preacher, state whether or not you are a member of any organization for decent literature?

A. The C. D. L., Citizens for Decent Literature.

19. Are you a Catholic?

A. No sir.

Mr. McMurry: That is all.

Cross examination.

By Mr. Williams:

1x. Reverend Simpson, did you or your organization name any magazine at the time you had the meeting with Mr. Austin?

A. Not specifically. We illustrated what we were talking about by the use of two magazines.

2x. As a matter of fact, wasn't your complaint at this time the fact that you were afraid that minors would get hold of this material?

A. Not altogether. The complaints that had been given to us were from parents of minor children into whose hands this material had come. But during the meeting we were concerned with obscenity in general.

3x. How long have you belonged to the C. D. A.?

A. Within the month.

4x. Within this last month?

A. That's right.

5x. It is sponsored by the Catholic Church?

A. No, it is not. There are two groups. There is a Catholic Citizens for Decent Literature and there is Citizens for Decent Literature. I belong to the latter, which is interdenominational.

[fol. 58] 6x. Now I will ask you if Mr. Austin did not agree to withdraw from sale any magazine that you or your group would name?

A. I don't believe he said that. I believe he said for us to let him know if anything came to hand that we considered obscene to call it to his attention.

7x. I want to read a question I asked you when we tried this case before, page 39. "I will ask you if any objection was raised at that meeting or any distinction made at that meeting between the sale of that literature in question to minors or adults?" Answer: "It is my recollection that he agreed to withdraw any magazine which we would name that we found objectionable." Was that your answer at that time?

A. It is if it is in the record.

8x. I am quoting from a shorthand transcript. You remember the girl that was there and took it, don't you?

A. Yes sir.

9x. And there was a tape recorder there too?

A. That's right.

10x. Well would you say that was your answer then?

A. That was the answer as I recalled it, sir.

11x. Well, which would be true, the answer then or the answer now?

A. As I recall, he didn't make any commitment, but we were to let him know what the magazine was and he would look at it and give it his attention, this was his promise to us.

12x. Did you ever furnish him with the name of any magazine?

A. No sir, we did not.

13x. I will ask you if I didn't ask you another question: "He did agree to withdraw any magazine that you named that you found objectionable?" Answer: "That's right." That was your testimony downstairs.

[fol. 59] Mr. McMurry: He has testified to that.

14x. You were attempting to testify that what you were saying down there then was true?

A. That's right.

Mr. Williams: That's all.

Mr. McMurry: That is the case for the Commonwealth.

The Court: I would like to have a recess for a sufficient period of time to allow me to read a memorandum on a motion for a directed verdict, and while I am reading this you can let the jury see the Exhibits 1 and 2. However, it will not be necessary for the jury to make a detailed examination of them because the exhibits will be available to you at the conclusion of the arguments in this case.

At the conclusion of the Commonwealth's testimony, the defendant moved for a directed verdict of acquittal, and the Court overruled the motion.

Following a statement to the jury by Mr. Apple, the defense called the witness, the defendant, WILLIAM L. AUSTIN, who after being sworn, testified as follows in response to interrogation by Mr. Williams:

1. State your name, please sir.

A. William L. Austin.

2. Where do you live, Mr. Austin?

A. On Route 4, Paducah.

3. Where is Route 4?
A. It's in the Reidland area.

4. What street or road do you live on?
[fol. 60] A. I live on the Benton Highway.

5. Mr. Austin, how old are you?
A. I am 50 years old.

6. And what sort of family do you have?
A. I have five children, two grandchildren, and my wife.

7. Five children, two grandchildren, and your wife? What are the ages of your children? Are they all grown?
A. No, from 14 to 24.

8. Do you have any of the children at home?
A. I have two.

9. What are their ages?
A. Fourteen and 16.

10. Boys or girls?
A. A boy and a girl. The girl is 14 and the boy is 16.

11. All right, what business are you in?
A. I am in the wholesale news distribution business.

12. Are you also in the retail business?
A. Here. I am in the wholesale business separately.

13. In what areas are you in the wholesale business?
A. Well, we have a wholesale agency in Shelbyville, Tennessee, we have an agency at Nashville, Tennessee, we have an agency at Jackson, Tennessee, we have an agency at Carbondale, Illinois, and at Paducah, Kentucky.

14. Do you have any agency in Missouri?
A. We service a large part—we service Southeastern Missouri from our Paducah operation, Cape Girardeau and south of there, Poplar Bluff.

15. By that you mean you service them with what sort of materials?

A. We service all periodicals, paper back books, comic and children's items, Bibles, anything in the general appeal [fol. 61] reading field.

16. Now how long—did you start the Readmore news stand in Paducah?

A. Yes, I did.

17. And how long has that been in operation?

A. About 13 years, I believe. Approximately 13 years.

18. During that period of time, Mr. Austin—

A. Twelve years.

19. That's all right. During that period of time has the Readmore news stand been owned by you?

A. Yes, it has.

20. What do you handle in the Readmore news stand? What do you have for sale?

A. Mr. Williams, we refer to the store as Readmore because it really isn't a news stand. We have a rather large book store incorporated in the operation. We have a—

21. What kind of books do you sell? I mean by that, do you sell only paper back books?

A. Oh no, we sell hard books, I was speaking of a hard book store. We handle hard books from all major publishers. We keep the best sellers from all the better lists of best sellers, and as I testified before, I maintain it as a service to the community.

22. Mr. Austin, just answer my questions. Let's not get into what was testified before. Mr. Austin, you handle hard back books, and you handle the ones that are on the best seller lists, and the New York Times?

A. Yes.

23. And the Saturday Review?

A. No, we use the Book Sellers Guide and the Publishers Weekly, and it's a little more reliable.

[fol. 62] 24. Now what do you mean, for my benefit, hard books or paper backs?

A. The only difference, Mr. Williams, the hard book is bound with a hard cover and the paper back book is bound with a soft cover.

25. You don't mean that a hard book is rough to read or anything ilke that?

A. No sir.

26. You are talking about covers?

A. That's right.

27. What other kinds of books do you sell? Do you sell any technical books?

A. Yes, we sell technical books, and I believe I said religious books, and in our Children's Department we have many, many children's books.

28. Mr. Austin, I heard one of the jury say he had bought a mechanical or mechanics handbook, or engineering handbook?

A. Technical, yes.

29. And you handle that kind of books?

A. Yes, I do.

30. And you handle religious books?

A. Yes, we do.

31. Is your store—are you a member of any particular organization by way of books?

A. We are a member of the American Book Sellers Association, the only membership in Paducah, and we also hold a membership in the Christian Book Sellers Association.

32. A membership where?

A. In Paducah and I believe Western Kentucky too, and one might be in Owensboro.

33. Now do you sell newspapers?

[fol. 63] A. Yes, I do, daily and Sunday.

34. And you sell paper back books?

A. Yes.

35. And magazines?

A. Yes.

36. Tell us about how many volumes or how many different magazines in a month you handle at Readmore?

A. You are speaking of titles, Mr. Williams?

37. Yes sir.

A. Titles, well it varies, Mr. Williams. I would say that there is three thousand titles, approximately, on sale, magazines, all time, and approximately four thousand titles of hard books, and approximately four thousand titles of the paper back books, and we have the newspapers in addition.

38. In all about eleven thousand, I would say.

39. Mr. Austin, in the operation of that business or your business all over these various places, what, if anything, have you done to attempt to regulate or limit the type of literature that you dispense?

A. Mr. Williams, I mentioned to you and it has been brought out that we use the second class permit quite a bit. We feel like a magazine that don't have a second class permit maybe should be withheld from general distribution, but frankly, I can't see any difference in the ones that have and don't have.

40. You have used that as—

A. We have tried to use it as a barometer. We have not completely done so but we stay very close to that. At least we ask our publishers to recognize that.

41. I will ask you whether it would be possible for your [fol. 64] concern to economically run an outfit like Readmore and personally censor each of those ten or eleven thousand titles?

Mr. McMurry: I object.

A. It is impossible.

The Court: I will sustain the objection.

Mr. Williams: I would like for him to answer by way of avowal.

Avowal Answer: It would be almost humanly impossible to read everything we handle.

42. Does the fact that a magazine or publication has a second class mailing permit from the Post Office Department, does that mean that it has been passed or approved by the Post Office Department?

Mr. McMurry: I object to that.

The Court: I will sustain the objection.

Mr. Williams: Let me finish my question.

The Court: Well, he started to answer and I assumed that you had finished your question. You may finish your question.

43. Mr. Austin, I ask you to wait until I have finished before you start your answer. Does the fact, and don't answer this because there will be an objection, until the Court tells you what to do.

The Court: I will rule on the objections, Mr. Williams. I am not telling the witness what he can do, I am ruling on objections to the questions.

Mr. Williams: I understand. I am asking that he not try to answer until you have ruled.

44. Does the fact that a publication has the second class permit of the Post Office Department mean that that publication has been approved as far as obscenity is concerned, [fol. 65] as far as it being sent through the United States mails?

Mr. McMurry: I object.

The Court: I will sustain the objection.

Mr. Williams: I will ask that he answer as an avowal.

Answer by Avowal: It means the Post Office has considered it fit to be mailed at the reduced rate of second class.

45. Now they have mentioned here Playboy and Cavalier and Dude, Mr. McMurry has, in the voir dire examination of the jury—

The Court: That is not a matter that is in evidence, Mr. Williams.

Mr. Williams (continuing): It has been mentioned to the jury and they asked Mrs. Wathen about it. I will ask you whether or not those magazines have a second class mailing permit?

Mr. McMurry: I object.

A. They do.

The Court: I will sustain the objection.

Mr. Williams: Lean over and whisper your answer to the reporter as an avowal.

Answer by Avowal: Those magazines do have a second class permit I believe.

46. Mr. Austin, the two magazines that have been introduced into evidence there are—strike that question, please. What other effort, do you have any policy at Readmore as far as the sale of objectionable material is concerned?

A. I do have.

47. What is that policy?

A. I completely cooperate with any group or even individual that comes to me and expresses a complaint.

48. What do you mean by "completely cooperate?"

A. I remove from sale any publication that they feel is offensive to them or their representatives. All they have [fol. 66] to do is to advise me what they wanted taken off.

49. Did Mrs. Wathen or has any member of Citizens for Decent Literature, or has any member of the Paducah Council of Churches ever asked you to remove any publication, ever named any publication that hasn't been removed?

A. They have not. They have not up to now.

50. Have you previously or at any time a discussion was made asked them for such a list?

A. I have.

51. And to date you have never been furnished such a list?

A. To date I have never been furnished any list of guidance.

52. Mr. Austin, does the fact that a magazine does not have a second class permit mean that it has been turned down by the Post Office Department, or does it mean that it hasn't been considered by the Department—

Mr. McMurry: Object.

A. It could mean either—

Mr. Williams: Wait a minute.

The Court: I will sustain the objection.

Mr. Williams: Lean over there and whisper your answer to the reporter.

Answer by Avowal: It could mean either that they didn't apply or were refused.

53. I hand you a letter, a copy of a letter, dated February 6, 1958, and ask you whether or not that is the letter that you wrote or dictated?

A. It is.

54. And will you tell the jury who that letter is to?

A. To a gentleman by the name of Ray Kirk. He is [fol. 67] president of the Allstate News Company, Chicago, Illinois.

55. Will you examine Exhibits 1 and 2 introduced by the State, High Heels and Spree, and tell us who distributed them?

A. These are distributed by the Allstate News Company, Mr. Kirk's company.

56. By Mr. Kirk's company?

A. Yes sir.

57. All right sir, what is the date of the letter?

A. February 6, 1958.

58. Is that a copy of the letter you mailed to Mr. Kirk?

A. Yes sir.

59. Will you read that letter to the jury?

Mr. McMurry: Object.

The Court: I will sustain the objection.

Mr. Williams: We offer the letter as an avowal and ask that the letter be marked Defendant's Exhibit 1 for identification.

The Court: Let it be so marked and received as an avowal.

Mr. Apple: Your Honor, may I approach the bench? (Following a conference at the bench, Mr. Williams continues).

60. Mr. Austin, these two magazines, or any of the magazines— Mrs. Wathen testified that she got two magazines from behind the counter, that they were given to her from behind the counter at your place of business on September 28, 1963, and that they were stapled. Will you tell the jury why they were stapled?

A. Glad to. It has been a policy, or was a policy of the store before these type of magazines were removed behind the counter were stapled. They were stapled because, at the suggestion of people and pastors, and people who thought they know what the community should have, that [fol. 68] these magazines would be better displayed

stapled, so we went to the expense of stapling them so no one could observe the contents of the magazines. And not only did we staple these magazines, we stapled the hot rod magazines that are bought by the younger generation; we stapled some of our picture magazines that had eye appeal but were just pictures and quickly examined, and that was the reason these magazines were stapled.

61. Mr. Austin, I hand you what has been identified as Defendant's Exhibit No. 2, and ask you what that picture represents?

A. That is the picture of the Readmore cash register counter and the display of the type magazines that are being questioned in this court today.

62. All right now, where are those magazines—does that picture show the stand we are talking about?

A. Yes, it does.

63. Why is it back there?

A. It is completely behind the register counter so that no one can examine the magazines unless they are first purchased and that limits our sales to strictly always to minors.

64. Are they for sale to minors, you mean you sell to minors?

A. No, sales to adults and limit minors.

65. You said you sold to minors.

A. I beg your pardon. No minors can ever look at the books, stapled or otherwise.

66. Is there any limit to the sales of those magazines? Do you limit it to adults only?

A. Adults only, 21 years old or over.

67. All right sir, now I will hand you Exhibit No. 3 and ask you if that is just a different view of the same thing?

A. It is just a different view.

[fol. 69] 68. So far as you know, do all of those magazines that are there have the second class—now wait to

answer this—have the second class mailing permit of the United States Post Office Department?

Mr. McMurry: I don't think that is material. I couldn't care less. Let him answer but I want him to be careful. Did he say all those had it?

Mr. Williams: He said so far as he knew, they did. I asked him—

The Witness: So far as I know they all do have.

69. Mr. Austin, I believe you said you had never had a complaint. Do I understand that the community—that you have been selling that type of magazine as pictured there for years, is that right?

A. That's right.

70. And that there has never been an objection as far as the community is concerned?

A. There has never been an objection that we didn't observe and correct and adjust.

71. Has there been any objection to any of the magazines that are there? Has anyone said "I want you to remove Cavalier—"

A. No, not by title, no sir, there has never been, not by title. That is what we wanted and asked for.

72. Mr. Austin, I will ask you whether or not the same magazines that are pictured in those photographs you have introduced as exhibits Nos. 2 and 3, whether or not they are sold in the entire area where you distribute magazines?

Mr. McMurry: I object.

A. Yes, they are.

Mr. Williams: Mr. Austin, when they object, you wait to answer.

A. Will you state the question again?

[fol. 70] The Reporter, reading: Mr. Austin, I will ask you whether or not the same magazines that are pictured

in those photographs you have introduced as exhibits Nos. 2 and 3, whether or not they are sold in the entire area where you distribute magazines?

Mr. McMurry: He is talking about these particular magazines that are pictured in the picture here.

The Court: That is why I couldn't understand the question. I didn't know what magazines he is referring to.

Mr. Williams: I am referring to Gentlemen, Cavalier, Playboy, Mister, Rogue, and Sir and Dude, among others that are there. Are all of those magazines sold in the entire area that your various news distribution agency does business?

Mr. McMurry: I object.

The Court: I will sustain the objection.

Mr. Williams: You may answer it quietly by whispering to the reporter.

Answer by Avowal: Yes, in general they are, but we service 300, approximately, towns, and there might be small outlets that do not handle them because of no demand.

73. Mr. Austin, I will ask you whether or not any of those magazines have been banned or restricted by any governmental authority or community or group in any of the areas that they are sold in?

Mr. McMurry: Object.

The Court: I will sustain the objection.

Mr. Williams: Answer to the reporter.

Answer by Avowal: Not to my knowledge. There has been no general restriction on the sale of these magazines.

[fol. 71] 74. Do you know whether or not the Allstate News Company is now in business?

A. No, the Allstate News Company, the publisher of those two magazines, is out of business.

75. Did it go bankrupt?

A. It went bankrupt. There was no demand for their publications.

76. Do you yourself know or did anybody ever advise you that these two magazines were on the stand?

A. They did not.

77. The two in evidence here?

A. They did not. The first I knew of it was when I received this summons, and of course, I immediately removed them.

78. Have you ever sold them since?

A. No sir.

Mr. Williams: You may ask him.

Cross examination.

By Mr. McMurry:

1x. Mr. Austin, how long have you been in the magazine selling business?

A. Since 1946, Mr. McMurry, the latter part of it.

2x. That was here at Readmore?

A. It was in Paducah. I was in the wholesale only then.

3x. I see. What was the name of that business?

A. Basin News Company.

4x. And that's the same wholesale business that you operate out on the Husbands Road here in McCracken County?

A. That's right, Mr. McMurry.

5x. How long have you operated the retail business down on Fifth Street?

[fol. 72] A. I stated 13, I believe it is 12 years. I believe it is closer to 12.

6x. And since that time you have been the owner and operator of both of those businesses?

A. Yes, I have, Mr. McMurry.

7x. Now these two publications that are in evidence here, Spree and High Heels, Mr. Austin, I presume from your testimony they came from the Allstate News Company?

A. That's right.

8x. And to what organization were they sent here in Paducah?

A. To the Basin News Company.

9x. And that is out on Husbands Road here in McCracken County?

A. That's right.

10x. And the Basin News Company is the same wholesale company you own and operate?

A. That is correct.

11x. Now after they reached the Basin News Company, what became of the magazines? Where did they go then?

A. Distribution was made on the magazines.

12x. Then the Basin News Company distributed the magazines to the various retailers?

A. That's correct.

13x. And among others, you own a retail business, Readmore?

A. That's right. I don't manage it.

14x. Then your wholesale company sent these two magazines to your retail company?

A. That would be right, Mr. McMurry.

15x. And when they reached your retail company, it was determined that they were called adult reading and placed [fol. 73] in the segregated slots behind the checkout counter?

A. That's right.

16x. Now you say you never had any complaints about titles of the magazines?

A. No by title, that's correct.

17x. You never had a complaint as to title?

A. That's right.

18. You have had a lot of complaints as to class of magazines?

A. No sir, I haven't had a lot of complaints as to class.

19x. Well, have you had complaints as to the class of the magazines?

A. In 1960 there was a complaint, not regarding that store.

20x. I understand.

A. And I was asked by the City Commissioners to meet with them to see if there was any reason for this complaint and if anything could be done about it, and I did, and they said they thought maybe around the schools that the more adult reading should not be sent there, and I cooperated and I said "I will," and I cooperated with them.

21x. Now you heard the minister testify?

A. I did, I sure did.

22x. And on that occasion, in May of 1963, the complaints were discussed involving this particular class of magazine, was it not?

A. That is correct.

23x. And you did not take it off the stand, did you?

A. That was not a complaint, as testified, it was a discussion in general as to the type of material.

24x. You knew that they objected to the sale of that material in McCracken County, didn't you?

[fol. 74] Mr. Apple: We object to any further questions about the class of magazines because you have made it a point that these two magazines are the only ones in issue, Mr. McMurry.

The Court: There has been some evidence introduced, Defendant's Exhibits 2 and 3, that show other magazines

of similar class. I think that perhaps that was in evidence and there was no objection then.

The Witness: Will you state the question again?

25x. I will ask you if on that occasion in May the ministers made you aware of the fact that they objected to the sale of that class of material in your operation here in Paducah, Kentucky?

A. Their objection was in a very general way. They didn't specify any titles, they spoke in general terms. There was one title mentioned at the time, only one.

26x. As a result of that you testified on your own you went back there and picked up some several publications and put them behind the news rack?

A. I testified, Mr. McMurry, that because of this meeting with these pastors, I noted some disturbance there. I removed those magazines to behind the counter, the cash register counter, and there would never be any question at all about adults only buying them or seeing the magazines. That's my testimony.

27x. All right now, how many titles were moved behind the counter?

A. I would say, and this would be an estimate, 25 to 30 titles.

28x. Twenty-five to 30 titles?

A. Yes sir.

29x. How long have you sold the publication known as Spree?

[fol. 75] A. I do not know.

30x. How long have you sold the publication known as High Heels?

A. Frankly, I didn't even know there was a High Heels. I had heard of Spree, but I never knew of High Heels.

31x. All the time you were buying it from an outfit up in Chicago, it was coming down to Basin News Company, which you owned and operated, and you were selling it

from Basin News Company over to the Readmore news stand, another operation of yours, and you didn't even know the magazine was in existence?

A. That is correct. We handle close to a million publications a month, Mr. McMurry, in just one operation.

32x. You just handle 25 back behind that counter?

A. We handle 25 to 30—

33x. Back behind that counter?

A. Twenty-five to 30. I said I estimated the number of titles. I couldn't name those titles either.

34x. Do you consider that these two publications are obscene?

A. I do not.

36x. You do not?

A. The magazines are poor taste, but not obscene.

37x. You have looked at them?

A. I examined them at the trial.

38x. Turn to page 58 in this Spree magazine and if you will, read to the jury the third ad on that page.

Mr. Apple: We object to that.

Mr. Williams: We object to reading any part of the magazines. He can read the whole magazine.

[fol. 76] The Court: He can ask him to read a part of it. Overruled.

Mr. McMurry: I will let him read that and I will ask him if he thinks that is obscene or not. Read it to yourself. I hate for him to read that out loud.

Mr. Williams: That is not the test.

Mr. McMurry, to the witness: I just want to know if you consider that indecent or obscene.

A. No, I don't. I consider that clinical more than anything.

39x. Mr. Austin, do you read these magazines, this kind of magazine?

A. I read Playboy magazine regularly, if you class that as this kind, and I consider this practically the same kind.

40x. I don't class that as this kind and I don't think you do. But you don't read these publications?

A. My reading time is limited.

41x. Do you allow them in your home?

A. Well, I take Playboy home. It's on our coffee table.

42x. On your coffee table? Now you have testified about the objections that were voiced at the ministerial meeting in May, 1963. I will ask you whether or not you received any objections from any of your retail outlets in McCracken County in the past several months?

Mr. Williams: We object.

The Court: I will sustain the objection. I think we are going a little too far afield. We are primarily concerned with the two magazines in question here.

43x. Let me ask you this question: Shortly after your meeting with the ministers in May of 1963, back in June or July of 1963, state whether or not you received complaints and demands to remove these girlie magazines from [fol. 77] news stands other than Readmore?

Mr. Williams: We object.

The Court: Other than Readmore?

Mr. McMurry: Yes sir, he has got a wholesale—

The Court: I will sustain the objection.

44x. Mr. Austin, as a retailer in books and magazines, do you feel that you bear any responsibility to the public as to what you sell?

Mr. Williams: We object to that question. I think it is incompetent, but he may answer. I will withdraw my objection.

The Court: Go ahead and answer.

A. I certainly do.

Mr. McMurry: That's all.

Redirect examination.

By Mr. Williams:

1r. Mr. Austin, I forgot to ask you. What is your church affiliation?

A. I am a Methodist.

2r. A Methodist? And your family?

A. Yes sir.

3r. You mentioned—Mr. McMurry brought out that you had a complaint in 1960 about magazines being near a school, which would be classified as adult reading. I will ask you to tell us what the titles of those magazines were.

A. Well, as I remember, now that's some time back, it would be Playboy was one of the primary ones, because Playboy was the best selling in the adult field.

4r. What about—was Esquire one of them?

A. Esquire was one that was objected to by the Commissioners, just one store, and we removed it from there, and there was Cavalier and probably Dude and Gent, I am [fol. 78] just naming them as their sale potential.

5r. And they were removed?

A. To the objection of the dealer. The dealer resented us taking those. It was rather high handed and we didn't like being a part of taking magazines out of his stand, because they certainly were not questionable as far as we are concerned, and they themselves didn't consider them questionable, but we did take them out of the stand.

6r. At the request of the Commissioners?

A. Yes sir, at the request of the Commissioners.

7r. Mr. Austin, in the operation of your business I believe you said you had agencies in Nashville, Shelbyville, and Jackson, and other places. Is it necessary for you to be out of town?

A. Mr. Williams, I feel that I am fortunate when I am at home 30 per cent of the time. I hope in the future to change that but now 30 per cent is the best we can do, in Paducah.

8r. And in this area?
A. Yes sir.

Mr. Williams: That's all.

At the request of the defense, the Court granted a five-minute recess.

The Court: The jury may be in recess for five minutes. The same admonition I gave before will still apply.

Upon the reconvening of court, the defendant called and had sworn the witness, CURELIA STAUDT, who testified as follows in response to questions by Mr. Apple:

1. Would you state your name, please?
[fol. 79] A. Curelia Staudt.

2. Where do you live, Mrs. Staudt?
A. At 1616 Monroe.

3. That's here in Paducah?
A. Yes sir.

4. Are you employed anywhere?
A. At Readmore.

5. How long have you been employed there?
A. It will be five years in June.

6. What are your duties at Readmore?
A. I am a clerk.

7. What hours do you work?
A. I work from 8:00 in the morning to 3:30 in the afternoon.

8. What are your general duties as a clerk at Readmore?
A. I have certain sections that I do ordering for besides being a clerk.

9. Do you work in both sections of the store, or all around the store?

A. Yes, I do.

10. Have you heard the testimony here today?

A. Yes sir.

11. Do you know where these magazines are kept which have been in evidence today, or magazines like them?

A. Yes, I do.

12. Where is that?

A. Behind the register.

13. Behind the register?

A. Yes.

14. And when were they moved behind the register?

A. I don't know exactly. It hasn't been too awfully long.

[fol. 80] 15. Do you know how they came to be moved?

A. Yes, Mr. Austin said he had some complaints of them and he wanted them moved back there so we could see who bought them.

16. Now what instructions do you have about selling those particular magazines?

A. I was instructed when I went to work there that we were not to sell them to anyone under 21 years of age.

17. Do you check all of the magazines that come into your store?

A. No, I don't. I don't put the magazines up, however I do help, if they come in and I help until time for me to go home.

18. What does that, putting up the magazines, consist of?

A. We have to check the magazines and put them on the racks.

19. Are these magazines stapled?

A. No, not now they aren't.

20. Were they ever stapled?
A. At one time they had some of them stapled.

21. What were the ones that were stapled?
A. Adult magazines and hot rod magazines and car magazines.

22. What was the reason for stapling them?
A. To keep people from reading them.

23. They would stand there and leave through them?
A. That's right.

24. And never buy them?
A. That's right.

25. When you put the magazines up on the stand, do you just take them out of the bundles and put them up there?

Mr. McMurry: Object, leading question.

26. What do you do when you put the magazines on the racks?
A. We count them and put them in the places where they are supposed to be.

[fol. 81] 27. You just count them?
A. That's right.

28. What kind of customers have you observed that buy these kind of magazines?

Mr. McMurry: I object.
The Court: Overruled.

A. Well, I haven't sold too many of them, but we have some of the better class of people in Paducah that do buy them.

29. How many women?
A. I have never sold any to a woman.

30. Mrs. Staudt, you said you work down there in the daytime?
A. Yes.

31. Do you see Mr. Austin down there much?
A. No, not too often. Mr. Austin doesn't come in much.

32. Do you know how often he does come in?
A. Well, if we see him once a week, that's about as often as Mr. Austin gets to come in.

Mr. Apple: You may ask her.

Cross examination.

By Mr. McMurry:

1x. I am sorry, I didn't get your last name.
A. Staudt.

2x. How do you spell it?
A. S-t-a-u-d-t.

3x. You are an employee there at Readmore and have been for some five years?
A. Yes sir, it will be in June.

Mr. McMurry: That is all.
Mr. Williams: Stand down.

[fol. 82] The witness, WADE SHERRILL, was then called by the defense and after being sworn testified as follows in response to questions by Mr. Williams:

1. State your name, please.
A. Wade Sherrill.

2. Where do you live?
A. 247 Clements.

3. What do you do?
A. I am a receiving clerk and general warehouse manager.

4. Receiving clerk and warehouse manager?
A. Yes sir.

5. For who?
A. Mr. Austin, Basin News Company.

6. Basin News Company?
A. Yes sir.

7. And that is out on the Husbands Road?
A. Yes sir.

8. Mr. Sherrill, what do you handle out there?
A. We handle magazines, small books, educational small books, just all types of periodicals and newspapers.

9. Do you know approximately how many different titles you handle out there?
A. Well, I would say that we receive close to a thousand different titles every month, and about a half million copies per month.

10. Now what territory does Basin News serve?
A. Missouri, Tennessee, parts of Illinois, and Kentucky.

11. How much of Kentucky do you service?
A. Well, up around the Lake, Murray, Mayfield, just the whole general area around here.

[fol. 83] 12. Mr. Sherrill, how much of the time is Mr. Austin there, present at Basin News Company?
A. Well, he is hardly ever there. We are lucky to see him every week or ten days.

13. Do you have complete authority in the warehouse?
A. Yes sir, in the warehouse.

14. Now do you have any instructions or policy so far as distributing magazines that do not have second class mailing permits?

Mr. McMurry: I object.
The Court: I will sustain the objection.
Mr. Williams: Lean over and whisper the answer to the reporter out of the hearing of the jury.

Answer by Avowal: We don't put any out that doesn't have second class mailing perimits. That is my instructions.

15. How long have you been working for Mr. Austin?
A. Approximately nine years, including after school.

16. How did you start out?
A. I started out carrying papers.

17. Carrying papers for him?
A. Yes sir.

18. Mr. Sherrill, can you tell us whether or not—and wait to answer this—can you tell us whether or not it is possible for your organization to check all of the publications you handle so far as what's in them and things of that kind?

Mr. McMurry: I object.

The Court: I will sustain the objection.

Mr. Williams: Whisper your answer to the reporter out of the hearing of the jury.

[fol. 84] Answer by Avowal: It is impossible for us to check everything. The only thing we check now is second class mailings.

Mr. Williams: That is all.

Cross examination.

By Mr. McMurry:

1x. How long have you been warehouse manager, Mr. Sherrill?

A. I will say about a year. I am warehouse manager when Bob Austin, Mr. Austin's son, is out of town, and most of the time he is out of town here lately.

Mr. McMurry: That's all.

The defense then called and had sworn DR. C. S. LOWRY, who testified as follows in response to interrogation by Mr. Williams:

1. You are Dr. C. S. Lowry?
A. Yes sir.

2. Dr. Lowry, what education do you have?
A. I have a bachelor of arts degree, two masters of arts degrees and one PhD degree.

3. Where did you get those various degrees?
A. I got the bachelor of arts degree and one master of arts degree from Harvard University, and I took my PhD degree from the University of Kentucky after doing two years of it at Harvard.

4. Dr. Lowry, where are you now employed?
A. At Murray State College at Murray, Kentucky.

5. How long have you been so employed?
A. A little over 39½ years. It will be 40 in June.

6. Dr. Lowry, what is your position there?
[fol. 85] A. I am head of the Department of Social Science and professor.

7. Just in a brief way, what is the Department of Social Science concerned with?
A. It includes what we call the Division of History, Geography, Economics, Sociology, Political Science, and Philosophy, six divisions.

8. To summarize, we can say the Department of Social Science is all together?
A. Yes.

9. And it concerns the study of man or what makes man click?
A. Man in his social relations, including political, economic, social and cultural, and religious, yes.

10. Dr. Lowry, I will ask you if you know of any studies that have been made on the effect of so-called obscene literature on people?

Mr. McMurry: I object.

The Court: I think I will let the doctor answer. Overruled.

A. No studies that I know of have been made on that particular topic, of obscene literature. Of course we have the seduction of the innocent, which is a study made by a doctor on the effect of comic books, particularly—

11. I am not talking about comic books.

A. No detailed studies have been made.

12. There is no contention here that this magazine has been sold to anyone other than adults. Has there been anything in the adult field?

Mr. McMurry: I object to the question. It is too general.

The Court: I don't know that I understand the purpose of the question. I assume it could be considered as qualifying the witness as an expert, but I don't know that it has [fol. 86] anything to do with the offense.

13. Dr. Lowry, is there any proof or study in existence that you know of, and as such you are acquainted with studies on the behavior of man, as a general proposition?

A. Yes.

14. In your position. Is there any proof that you know about in any study that has been made that shows that girl magazines and magazines such as Playboy, any of these magazines, have any adverse effect on society as a whole?

Mr. McMurry: I object.

The Court: Overruled.

Mr. Williams: You may answer.

A. So far as I know, and I have made a very careful search, there has been no study made which establishes it to be a fact that this kind of literature has any adverse effect, and I might say, any good effect.

15. Good or bad?

A. That's right.

The Court: Is that question aimed at the individual or society? I didn't quite understand what you are talking about. Are you referring to society as a whole, Doctor?

A. Yes sir, yes sir.

The Court: And not the individual?

A. That's right. Now if I may say so, and of course you can rule me out if you want to, we have had similar studies involving other areas of conduct, but not this particular one. For example, we know—

Mr. McMurry: I object to that.

The Court: I will sustain the objection to anything unless a question is asked where the attorneys for the Com-
[fol. 87] monwealth will know what the purpose of the question is, Doctor. I will sustain the objection to comment on other lines.

16. I will ask you whether or not there is an opinion of quite a segment of people in your field of study and among the professors in the various colleges over the country and psychiatrists that magazines of the so-called girlie magazine type serve a good purpose as an outlet for some people?

Mr. McMurry: I am going to object to that.

The Court: I will sustain the objection.

Mr. Williams: Doctor, will you whisper the answer to the reporter?

Answer by Avowal: There is reason to believe that this kind of a material does have an effect to disgust one with sex.

17. Doctor, I will ask you whether or not you have at my request examined the two magazines that have been introduced in evidence, copies of the same magazines I believe, and I ask you to look at those two, Exhibits 1 and 2 of the Commonwealth, and tell us whether or not you have examined those magazines for me.

A. I have examined those two magazines, High Heels and Spree, yes sir.

18. From your examination will you tell the Court and the jury what your examination revealed in so far as High Heels is concerned?

Mr. McMurry: I object.

The Court: I will sustain the objection. That is too general, Mr. Williams. The jury can determine from its own examination what is revealed.

19. Doctor, from your examination of the magazine, High Heels, what is its general overall purpose?

Mr. McMurry: I object. I hate to make a nuisance out of [fol. 88] myself here, but—

The Court: I will let the doctor answer if he thinks he can answer what the purpose of the magazine is. Go ahead, Doctor.

A. The purpose of the magazine in my opinion is to make money, and they use sex, just like they do in selling Camel cigarettes, as a come-on.

Mr. McMurry: I will withdraw my objection.

20. Now Dr. Lowry, what is, what, in your opinion, is the overall effect of the magazine High Heels on the average person?

Mr. McMurry: I object. Let us approach the bench, your honor.

(Conference at bench.)

The Court: I will sustain the objection.

21. I will ask you from your examination of those two magazines whether or not—first, let me ask you, are you generally aware of the magazines that are sold in the area of Western Kentucky? I don't mean by title. Have you seen other magazines of similar type?

A. Yes, it is a part of my business to know these things and I am fairly aware of the types of literature that college students, in particular, read.

22. I will ask you whether or not this particular type of magazine and Playboy and Dude and Cavalier, those types of magazines, are generally sold and accepted in Kentucky, West Tennessee, Southern Illinois, the entire area?

Mr. McMurry: Just a minute, we object.

The Court: I will sustain the objection.

Mr. Williams: Doctor, whisper your answer to the reporter, please.

Answer by Avowal: This type of magazine is sold very widely in this area.

23. I will ask you if it is not a fact that this type of [fol. 89] magazine, and wait to answer, has been sold in this entire area that I asked you about for a long number of years and accepted by the various communities?

Mr. McMurry: I object.

The Court: And accepted by the various communities?

Mr. Williams: Yes sir.

The Court: I will let him answer if he can.

Mr. Williams: I mean by that, no restrictions.

The Court: I don't think you can qualify the question.

A. Yes, they have been sold and I have purchased, unfortunately, some during my—

24. What?

A. I have purchased some of these magazines.

Mr. McMurry: You added one other word there I believe, Doctor.

The Reporter: I didn't get that last word.

A. Unfortunately, it is unpleasant. That's what I mean by that.

25. Now Doctor, you said it is unpleasant. What do you mean by that?

A. I mean by that that this is cheap stuff and unpleasant, and you don't like to deal with it, but since you are responsible for directing certain people, you are supposed to know what they consume by way of vision and reading and what not.

26. Now are those magzines, do they seem then, those two there, High Heels and Spree, the publications you have examined for me, do they in any way exceed or go beyond the customary limits of candor in the community?

Mr. McMurry: I object.

27. I mean by the community the whole area of Western Kentucky.

The Court: I will let him answer.

A. My answer to that would be "no," they do not go as far as some which are generally accepted.

[fol. 90] 28. I will ask you whether or not these magazines are such, the two we are interested in here, are such as would create a desire or shameful or morbid interest in nudity or sex in the average person who might examine them?

Mr. McMurry: I object.
The Court: Overruled.
Mr. Williams: You may answer.

A. Quite the contrary, they would seem to disgust one with the whole subject of sex, they are so cheaply and poorly done.

29. Is their treatment or the pictures in those two magazines, are they any more revealing of the human body than pictures in other publications that are accepted by the various communities all over the country?

A. I would say no.

Mr. McMurry: I object.

The Court: I will sustain the objection.

The Witness: I am sorry, sir.

30. Doctor, are the stories or words that are in those magazines, and wait to answer this question, are the stories that are in those magazines any more vulgar, any more offensive than are contained in other publications that are accepted over the country?

Mr. McMurry: Object.

The Court: You haven't qualified the witness. Have you read the entire magazines?

The Witness: I have.

The Court: Cover to cover?

The Witness: Yes.

The Court: I will let him answer.

[fol. 91] A. The articles in Spree are not unsavory. As a matter of fact, you might take two of them as somewhat educational on a pretty low level. "The New Boom in White Slavery" might be factual, I don't know whether it is or not, and "I Plotted Adolph Hitler's Murder," that might be factual, I don't know, but it's not objectionable, and then a story, "Double Date," racy but not obscene, I would say.

31. Does it go any further, for example, in its description of sex than various books or publications generally accepted?

A. It doesn't go as far as the current issue of the Readers Digest, in that matter.

Mr. McMurry: I am going to object to that answer and move to exclude it.

The Court: I will sustain the objection.

32. Is there an article in the current issue of the Readers Digest on sex that you think goes further?

Mr. McMurry: I object.

The Court: I will sustain the objection.

Mr. Williams: Whisper your answer to the reporter as an avowal.

Answer as Avowal: There is an article which goes further than any article in this number of Spree or High Heels.

Mr. Williams: You may ask him.

Cross examination.

By Mr. McMurry:

1x. Dr. Lowry, what is your particular subject that you teach there at Murray State College?

A. I don't know. Let me explain that. My major subject, of course, is in the history of political philosophy. I am the head of the Department of Social Science, and it falls [fol. 92] to me lots of times to teach in that department which no one else is qualified or courageous enough to do it. I think I would say that my principal subject at the present time is economics.

2x. What courses are you teaching at the present time?

A. I am teaching right now two courses in economics, one of them is a beginning course and the other is labor relations. I am also teaching a course now in American government. Last semester I had practically the same thing except I taught a beginning course in the field of sociology and anthropology.

3x. Sociology and anthropology?

A. Yes sir.

4x. When did you teach those?

A. Last semester and I have taught one or more sections of those for the last four or five semesters.

5x. What is the study of anthropology?

A. It is the study of the development of man's culture, that is, his customs and religions and social organizations and what not.

6x. And from the beginning of time to the present?

A. From the beginning of time to the present, yes. I teach cultural anthropology now.

7x. And you are teaching economics?

A. Teaching economics this semester, yes. We are one month in the second semester.

8x. When did you last make the rounds of the book stands in Paducah to see what was on them?

A. Readmore, and I didn't make the rounds here. The [fol. 93] last time I was in Readmore was about two weeks ago. I always go there when I come here.

9x. What is your purpose in going there?

A. To see what I can see, you know, of publications, new paper backs, and magazines and whatnot, and I am usually looking for some particular kind of a book.

10x. I see, you are a customer then of Readmore's?

A. Yes. I don't buy a lot of stuff there. I used to buy a whole lot, but my reading now is running a little away from the direction which he handles.

11x. You are reading stuff now that he doesn't even have?

A. Yes, yes.

12x. How long have you known Mr. Austin?

A. I have never met Mr. Austin until today.

13x. Never met him until today?

A. That's right.

14x. Do you know his wife?

A. No.

15x. You have been a customer down there how long?

A. Ever since he has been there. I don't know how long that has been.

16x. Would you say these magazines appeal to the prurient interest?

A. No.

17x. Well, I ask you what interest they would appeal to?

A. Curiosity, on the part of some.

18x. Now you said the magazines were published to make money out of sex.

A. No, I didn't say that.

19x. Well now, just what did you say?

[fol. 94] A. I said they use sex as a come-on to sell advertisements maybe, or something else. That is the way it is used in selling Camel cigarettes.

20x. I understand, but do you consider these books sexy then?

A. Yes, they are sexy.

Mr. Williams: Is it your contention, Mr. McMurry, that anything sexy is obscene?

Mr. McMurry: Not necessarily, Mr. Williams. Give me just a minute here. I have no further questions.

Redirect examination.

By Mr. Williams:

Mr. Doctor, I hand you six books, and I ask you to tell us whether or not those books have been sold and accepted in Western Kentucky and West Tennessee and in this whole geographical area.

Mr. McMurry: I object.

The Court: He can tell whether they have been sold or not.

Mr. Williams: Sold and accepted.

Mr. McMurry: He is saying have they been sold and accepted.

The Court: I will sustain the objection. We only have the two magazines on trial.

Mr. Williams: I merely want them in as an avowal. Will you mark these please for identification as Defendant's Exhibits 4 through 9. (Books so marked)

2r. You have examined the books as shown you as Exhibits 4 through 9, I asked you whether or not they have been accepted, the Court has ruled that you may not answer, and I will ask you to answer it by way of avowal. Whisper to the reporter.

Answer by Avowal: Those books have been sold and are [fol. 95] definitely accepted in the places with which I am familiar.

3r. Have you traveled over this geographical area?
A. Over the years, yes.

Mr. Williams: That is all.

Recross examination.

By Mr. McMurry:

1x. How long have you lived at Murray?
A. Thirty-nine and a little over a half years.

Mr. McMurry: That is all.

The defense then called and had sworn JAMES APPLE who testified as follows in response to questions by Mr. Williams:

1. You are James Apple?
A. Yes.

2. What is your profession?
A. Attorney at law.

3. With whom are you associated?
A. Mr. Charles Williams.

4. Mr. Apple, what do you have in your hand there?

A. This is a record of the case of Sunshine Book Company vs. Summerfield, a federal case.

5. I will ask you to hand it to the reporter and ask her to mark it Defendant's Exhibit No. 10. (Exhibit so marked.) Is that a record of a case tried before the Supreme Court of the United States?

A. Yes sir.

6. What type of publication was involved?

[fol. 96] Mr. McMurry: Are you going to show that to me before you—

Mr. Williams: Yes sir. (Shows exhibit to Mr. McMurry and the Court.)

Mr. McMurry: I object.

The Court: I will sustain the objection.

Mr. Williams: Will you answer by avowal?

Answer by Avowal: The type of magazine involved was Sunshine, and Health and Sun magazines and the publisher, which is Sunshine Book Company, was suing for injunction to enjoin the Post Office Department from confiscating copies of the two magazines in the exhibit. The Supreme Court of the United States sustained the injunction or granted the injunction preventing the Post Office Department from confiscating the magazines.

7. Mr. Apple, I will ask you whether or not the publication that is involved in that record was or was not more revealing of the body than either of the two publications in question here?

Mr. McMurry: I object.

The Court: I will sustain the objection.

Answer by Avowal: The magazines in question are more revealing in that they show front views of both nude males and females.

Mr. Williams: That is all.

At this time the defense called C. L. WERNER, who, after being sworn, testified as follows in response to interrogation by Mr. Williams:

1. You are Mr. C. L. Werner?
A. Yes sir.

Mr. Williams: May I approach the bench, your Honor?

[fol. 97] Following a conference at the bench, the Court announced:

The Court: Ladies and gentlemen of the jury, since this is the last witness for the defense, and as I understand it, the testimony will be taken as an avowal in the event the objections of the Commonwealth's attorneys are sustained, I am going to let the jury go and ask you to be back in the morning. Let me again admonish you not to discuss this case with anyone and do not discuss it among yourselves or form or express an opinion as to how it should be decided until it is submitted to you for that purpose. I also request and direct you not to read the newspaper account of this trial nor look at any television or radio account, if there is such, and that if anyone tries to influence you or call you in this regard I direct that you report that to the Court and do not discuss it with them. The jury is dismissed until 9:00 o'clock in the morning.

Following the withdrawal of the jury, Mr. Williams continued with the interrogation of Mr. Werner:

2. By whom are you employed, Mr. Werner?
A. By Charles Williams, attorney.

3. In what capacity?
A. Investigator.

4. Mr. Werner, I will ask you if you went to the Carnegie Library in Paducah and obtained certain books?
A. I did.

5. Will you tell the Court what books they were?
A. One publication, Masters of Modern Art—

Mr. McMurry: I object.

The Court: I will sustain the objection.

[fol. 98] Mr. Williams: You may answer by avowal.

Answer by Avowal: Masters of Modern Art, Museum of Modern Art.

Mr. Williams: Do I understand that the Commonwealth object to his testimony as to what books were obtained from the Carnegie Library?

Mr. McMurry: Yes sir, as irrelevant.

Mr. Williams: And the Court is sustaining that objection?

The Court: Yes sir, unless I announce otherwise.

6. Now what books did you obtain from the Carnegie Library?

A. Masters of Modern Art from the Museum of Modern Art, Pictures That Talk, U. S. Camera, 1959.

7. Tell us what volume it is, and so forth.

The Court: All of this is an avowal.

A. U. S. Camera, 1959, edited by Tom Maloney; a publication entitled Greek Sculpture by R. Lullies and M. Hirmer.

8. Mr. Werner, the Carnegie Library, where is it located?

A. At Ninth and Broadway, Paducah.

9. That is the public library for the City of Paducah?

A. Yes.

10. Were those books hidden or anything in the library?

A. No sir.

11. Were they available to you or to anyone of the general public?

A. As far as I know.

12. Did you make copies of pictures out of those various publications and books?

A. Yes, I did.

13. Do you have those pictures with you?
A. Yes, I do.

14. Will you take those pictures and let the reporter mark them as defendant's exhibits, and keep them in order [fol. 99] so you can identify them and tell the Court where they came from.

(Reporter marks pictures as Defendant's Exhibits 11 through 19.)

15. Mr. Werner, will you take those—have you identified those pictures yourself?
A. I have.

16. All right, tell us please where each picture came from.
A. The photograph marked 11—

17. The Defendant's Exhibit 11?
A. Defendant's Exhibit 11 is from Masters of Modern Art, page 15.

18. Go right through them.
A. The photograph marked Defendant's Exhibit 12 is from Masters of Modern Art, page 42. The photograph marked Defendant's Exhibit 13 is from Masters of Modern Art, page 44. Defendant's Exhibit 14 is a photograph of Masters of Modern Art, page 53. Defendant's Exhibit 15 is a photograph of page 105 Masters of Modern Art. Defendant's Exhibit 16 is a photograph of page 53 of Greek Sculpture. Defendant's Exhibit 17 is a photograph of page 72 of Greek Sculpture. Defendant's Exhibit 18 is a photograph of page 172 from Greek Sculpture. Defendant's Exhibit 19 is a photograph of page 138 from Pictures That Talk.

19. Mr. Werner, are those photographs which have been identified as defendant's Exhibits 11 through 19 accurate reproductions of photographs found in those books from the Carnegie Library?

A. They are.

Mr. Williams: The defendant tenders or offers those Exhibits 11 through 19 in evidence in this case.

Mr. McMurry: Object.

The Court: The objection to their offer and to all of the testimony of this witness is sustained and may be con-
[fol. 100] sidered only as an avowal.

Mr. Williams: That is the case for the defense.

The Court: We will adjourn this case until 9:00 o'clock in the morning. The same admonition I gave before will still apply.

Court reconvened on the following day, February 28, 1964, and by agreement of the parties the defense recalled the Defendant, WILLIAM L. AUSTIN, who testified as follows in response to interrogation by Mr. Williams, the jury being in the courtroom:

1. Mr. Austin, on yesterday you testified about the Allstate Company, I believe. You said that was the company that distributed the two magazines in question here to you, is that right?

A. That's right.

2. How many other companies of that nature does the Basin News Company do business with?

A. Well, of any nature, about twelve to fourteen companies, with approximately one thousand titles a month.

3. How is that done? Does Basin News, do they order certain magazines, or do the publishers and distributors ship them to you without ordering?

A. Mr. Williams, we have a blanket contract with these companies, we sign that, because it would be impossible for them to send us every publication and every book and ask us to review it and then give an order. We have a blanket arrangement with them and they ship us anything they happen to distribute or publish, and we never

set our order, we don't tell them how many to send us, or how few to send us. They use their own judgment on fig-[fol. 101] ures and statistics they have for the order that they will send us. We never order a publication, it is automatically sent to us under blanket contract.

4. Are you the only distributor of magazines in Paducah?

Mr. McMurry: Object.
The Court: Overruled.

A. No, I am not, Mr. Williams, there is another distributor working out of Earlington, Kentucky, that distributes in Paducah.

Cross examination.

By Mr. McMurry:

1x. State whether or not on November 11th, 1963, you addressed a letter to your retail dealers advising them that they did not have to take magazines off the stand that you mailed to them or that you distributed to them.

Mr. Williams: We object to that.
The Court: November the 11th? I will sustain the objection.
Mr. McMurry: No further questions.
Mr. Williams: That is all.

Rebuttal testimony.

By the Commonwealth:

The Commonwealth then called FREDERICK G. SCHLAFER, who, after being sworn, testified as follows in response to questions by Mr. McMurry:

1. State your name and address to the reporter, please.
A. Frederick G. Schlafer, 2800 Broadway, Paducah.

2. What is your profession?

A. I am the pastor of the Baptist Tabernacle here in Paducah.

3. Dr. Schlafer, what formal education do you have? [fol. 102] A. I have a bachelor's degree with a major in English and social science, a double major.

4. From what university?

A. From Houghton College, Houghton, New York. I have a master's degree with a major in Biblical studies and pastoral work at the Southern Baptist Seminary, Louisville, Kentucky, and then my doctor's degree is with a major in theology, a minor in sociology and missions, from the Louisville Seminary.

5. How long have you been a minister?

A. Since the last year of college, 1938.

6. You testified you live here in Paducah. How long have you lived in Paducah?

A. A total of five and a half years in two different periods. We came to Paducah originally in 1952 and were living here until 1954, moved to Birmingham, and returned in 1960 and have been living here since September '60 to the present.

7. Now Dr. Schlafer, as a part of your studies and work, have you made a study of the moral and social behavior of people?

A. Yes sir, this is one of my majors in college and I followed up with a minor in seminary. Of course, in my entire work I deal with people, social standards, moral standards, spiritual standards.

8. As a part of your study and your work, have you become acquainted with the people of this community, a cross section, the average person?

A. I have become acquainted with many people, and I

would say that I have become acquainted with the types of people that are in Paducah, not all of them individually.

9. I understand. Now as relates to reading material gen- [fol. 103] erally do you feel that you know the standards, contemporary standards of this community?

A. Yes sir, I do.

10. Have you examined the two books in this case, Spree and High Heels, on the reporter's desk there?

A. Yes sir, within the last 24 hours I have looked at them.

11. I will ask you, Doctor, whether or not in your opinion these two publications, using the contemporary community standards, would appeal to the prurient interest of the average person, prurient interest being a leaning toward the lewd?

Mr. Apple: Now that is not a definition of prurient interest.

Mr. McMurry: All right, a longing for something lewd or lecherous.

A. Yes sir, very definitely, both of them.

Mr. Williams: We object and move that be excluded.

The Court: I will overrule the objection and consider the testimony as being in rebuttal to the testimony of Dr. Lowry, for the defendant.

12. Doctor, will you say whether or not, using contemporary community standards, these particular magazines are obscene or indecent?

A. They are both obscene and indecedent. They appeal basically to the baser nature of man and they cheapen womanhood. They are detrimental from the standpoint of degrading something that God intended to be holy and sacred and beautiful in a right context.

13. Dr. Schlafer, the defense produced an economics professor from Murray State College here yesterday, Dr.

Lowry, who testified that as far as he knew no study had [fol. 104] been made of obscene literature in its effect on people. I will ask you if you know of any such study.

A. Yes sir, there have been a number of studies made, through Congress and our own state government.

Mr. McMurry: You may ask him.

Cross examination.

By Mr. Williams:

1x. Who made those studies?

A. I have reference to several of them here. In 1956 a Senate subcommittee investigated obscene literature and crime, a five hundred million dollar racket.

2x. Now we are talking about obscene literature and its effect on people. You are talking about a five hundred million dollar racket. They are different things, aren't they?

A. No. The reason it was investigated was that it was having an ill effect on people. If there had been no ill effect on people, there would be no statute.

3x. Are you acquainted with the study that was made of pre-marital—or children born to persons married in Utah, that were born or conceived prior to marriage and born after marriage? Are you aware of that study?

A. No, I am not acquainted with that one. I am acquainted with the fact that in Mayfield it was discovered that this type of literature—

Mr. Williams: We object to what happened in Mayfield.

The Court: I will sustain the objection.

4x. Doctor, now you say you have looked at those two magazines. Are you acquainted with Playboy and Cavalier and Dude?

A. I have seen some issues of Playboy.

5x. Have you ever seen Cavalier or Dude?

[fol. 105] A. I don't believe I have examined them.

6x. Do you know how extensively Cavalier and Dude and Playboy are read in this community?

A. I wouldn't know their circulation, Mr. Williams.

7x. You do know what they are?

A. Yes sir, they are on the news stands.

8x. They are similar magazines to these?

A. No, there is quite a contrast, I would say.

9x. How can you say that? You said you had seen one issue of Playboy.

Mr. McMurry: He didn't say that.

A. I said I had examined issues of Playboy.

10x. Well now they have nude women in them too, don't they?

A. Yes sir.

11x. As a matter of fact, there is no picture in either one of those magazines involved that shows a frontal view of any nude person, is there?

A. Not completely.

12x. Right. There is no view that shows the pubic area of any person, is there?

A. In part.

13x. I will ask you to show us where there is any pubic area shown in either of these magazines.

A. Here in this picture (indicating).

14x. It is your opinion that that picture shows the pubic area of that person, is that right?

A. A portion of it.

15x. Now that is a picture of a burleque dancer, isn't it?

A. Well, the picture says, "The burlesque is dead."

16x. Well, that is the caption, but that is what the picture [fol. 106] purports to present, isn't it.

A. I am not prepared to say that.

17x. You have never been to a burlesque show, have you, Doctor?

A. No, I have not.

18x. As a matter of fact, you do not read or examine that type material, do you, ordinarily?

A. Not regularly.

19x. As a matter of fact, you—are you acquainted or have you visited any news stands in this area and examined the material that is on the news stands?

A. Oh yes sir.

20x. Have you?

A. Yes.

21x. Then you know that Playboy and Dude and Cavalier and that type of magazine are sold generally all over the community?

A. There is quite a difference between Playboy and this type of magazine though.

22x. There is not difference in the amount of the body that is displayed, is there?

A. There is a great deal of difference from the standpoint of the amount of material that is objectionable.

23x. Oh you complained about the amount, not the amount of the body that is displayed? There is no more of the body displayed in these magazines than there is in Playboy, is there?

A. I am not concerned mainly about the pictures, Mr. Williams, but the reading material in these two magazines, particularly Spree.

24x. All right, take the reading material. Are there any four-letter words in the reading material, I mean vulgar words in the reading material in Spree?

[fol. 107] A. I would say from the standpoint of emphasis that is given to abnormal and immoral relations, this is true in Spree.

25x. Have you read the article on the sex knowledge of married couples in the most recent issue of Readers Digest?

A. No sir.

26x. Are you aware that that discusses sex—

Mr. McMurry: If the Court please, he has testified that he hasn't read it, and he would not be aware—

The Court: I will sustain the objection.

27x. Doctor, have you read or are you acquainted with the best selling books in this community and all over the country?

A. What titles are you referring to?

28x. Well, I refer to "Tropic of Cancer" for one, have you seen that?

A. I have seen it on the stand.

29x. You have never examined it?

A. No sir. However, the fact that it is on the stand doesn't mean that it is good to read.

30x. We are not talking about what's good to read, Doctor, under our law. We are talking about what is tolerated by the communities and by the country as a whole. But I will ask you if in that book and if in many of the books that are published and freely distributed all over this country there are not many four-letter words—

Mr. McMurry: Object.

Mr. Williams, continuing: that are vulgar and offensive to you and to me and to anybody else?

Mr. McMurry: Object.

The Court: I will let him answer if he can.

31x. Are they not?

[fol. 108] A. Very likely are.

32x. But there are no such words in those magazines, are there?

A. I would not say those words are not, because I haven't read every word in the magazines.

33x. But you didn't find any in your 24 hour—I mean examination you made in the last 24 hours?

A. I haven't found specific four-letter words but I have found suggestive material.

34x. You have found vivid descriptions, haven't you?

A. Yes sir.

35x. And there are vivid descriptions in the Decameron Tales of Boccaccio, aren't there? Have you ever read those?

A. No sir.

36x. That's an old classic, isn't it, and been in existence hundreds of years, and it is in all the libraries? Don't you know that is true, Doctor?

A. That's an old book.

37x. It's an old classic too, isn't it?

No answer by witness.

38x. Are you familiar with the best selling book called "Peyton Place"?

A. No, I am not, sir.

39x. Doctor, are you familiar with the book called "Carpet Baggers"?

A. I know the title, I am not familiar with the contents.

40x. You have not read that book either?

A. No.

41x. Do you know that that was a recent best seller all over the country?

A. I do not know that.

[fol. 109] 42x. You don't know that that book has—

Mr. McMurry: Now I object. He says he didn't know.

The Court: I will sustain the objection.

43x. As a matter of fact, Doctor, isn't it true that there are many books that are classified by the universities as classics that have detailed descriptions of the sexual act?

Mr. McMurry: I object.
The Court: I will let him answer.

A. I haven't read them, Mr. Williams.

44x. You haven't read them?
A. No sir.

45x. But you know that they are?
A. I know that there are books available of this nature.

46x. You know that they are in Carnegie Library and in university libraries all over this country?
A. But the entire content of the book or magazine is not of the nature of Spree. On—

47x. I understand that—

Mr. McMurry: Let him answer.

A. On practically every page there is something offensive to the moral man or woman.

48x. I believe that Webster's definition of prurient is a person who has a morbid or lascivious longings or desires. That wouldn't be an immoral man, would it?
A. It very well could be, sir.

49x. As a matter of fact, Doctor, those two magazines would not excite your sexual desires, would they?

Mr. McMurry: Object.
The Court: I will sustain the objection.

[fol. 110] 50x. I will ask you, Doctor, if those magazines would not make you want—be repulsive to you as far as sex is concerned?

Mr. McMurry: I object.
The Court: You said might be repulsive?
Mr. Williams: Yes.
The Court: I will let him go ahead and answer.

A. Yes, it's repulsive, very definitely.

51x. You are a minister?
A. Yes sir.

52x. That is your profession?
A. Right.

53x. I will ask you whether the description or the stories in that are any worse or any more offensive than that which appears in the 19th chapter of Genesis?
A. Yes sir, I would say they are, very definitely.

54x. Where Lot's two daughters became pregnant by him got him drunk and went to bed with him. That is pretty vivid, isn't it?
A. I have already answered that question, sir. These magazines are worse than anything I have ever read in the Scriptures. In the Scriptures this act is not glorified.

55x. Doctor, I understand, you are not only a witness here, but you are an advocate, helping Mr. McMurry and Mr. Jones prosecute this case.

Mr. McMurry: I object.
The Court: I will sustain the objection.
Mr. Williams: That's all.
Mr. McMurry: That's all, Doctor.

The Commonwealth then introduced and had sworn [fol. 111] ALBERT JONES, who, after being sworn, testified as follows in response to interrogation by Mr. McMurry:

1. State your name.
A. Albert Jones.

2. Mr. Jones, what official position do you hold in McCracken County?
A. Commonwealth Attorney of the Second Judicial District.

3. Mr. Jones, what was your profession before you came back to Paducah to practice law?

A. Special agent, Federal Bureau of Investigation.

4. How long were you an agent of the FBI?

A. Two years.

5. What does it take to become an agent of the FBI?

A. A law degree and certain physical qualifications and I suspect passing an examination, that is, loyal and character matters, such as that.

6. After you passed those examinations, were you given any training?

A. Yes sir, three months.

7. And after your three months training you served as an agent some two years?

A. Yes sir.

8. What degrees do you hold?

A. LL.B. from the University of Kentucky.

9. That's a law degree?

A. Yes sir.

10. Mr. Jones, Dr. Lowry testified here yesterday that there were no studies made on obscene literature in relation to the behavior of man. Is that statement accurate or not?

[fol. 112] A. That statement was not accurate.

11. Do you know of any such studies?

A. Yes sir.

Mr. McMurry: You may ask him.

Cross examination.

By Mr. Williams:

1x. You are assisting in the prosecution of this case, are you not?

A. That's correct. As Commonwealth Attorney it is part of my duties. Mr. McMurry as County Attorney has conducted the prosecution.

Mr. Williams: That is all.
Mr. McMurry: That's the case.

The Court read his instructions to the jury following which the arguments of counsel were presented. The argument for the defendant given by Mr. Williams, follows:

May it please the Court, Mr. McMurry, Mr. Jones, and may it please you, ladies and gentlemen of the jury, I don't know when any jury in McCracken County has been called upon to sit upon a more important case. This case is important because of the difficulty in which the defendant finds himself. It is important because of the difficult situation of defending something that to us is repulsive rather than attractive so far as exciting any prurient or lewd or lascivious desire. I don't believe any normal, average person can read or examine these magazines and have their sexual desires aroused. Mr. McMurry examined you on voir dire examination and we did too about whether you read or were acquainted with Cavalier or Dude or Playboy as being [fol. 113] similar magazines, and we accept that challenge. Those are magazines that are sold and maybe—I am sure Reverend Simpson or Reverend Schlafer, or there isn't a preacher in Paducah, if they had their way, that would permit that sort of magazine to be sold in the community. I am equally sure that if in this country we turn over to one group of people, whether they may be ministers or not, and while it may be desired that we turn it over to the ministers, I don't believe that that is the way the Constitution of this country was written, that it was to be turned over to any particular group. For example, Mr. Austin has down there in his store Bibles, he has Catholic Bibles and Protestant Bibles. If the Catholics had their way,

there would be no Protestant Bibles, and very probably if we Protestants had our way, there would be no Catholic Bibles.

Now, we are not talking about what is good or bad for the community. I will admit to you that there may be in this country material on the news stands and in the movies and elsewhere that isn't good. But just as the Decameron Tales of Boccaccio, which are hundreds of years old and on the library shelves of every university and every creditable library in the country, are offensive to a moral person who reads them. We do not live in a vacuum, and we have come a long way, whether it is progress or not, I won't debate it, but we do, we discuss sex, for example, much more openly than we ever used to. There was a time when it was a crime for a woman to appear on a beach with any part of her torso exposed. The bathing suits had to be down to her knees and the tops had to be down to her [fol. 114] elbows. But you all know how we would laugh at such a woman who appeared on the beach today.

But let us think further for a few moments. Mr. McMurry is going to read to you, I am sure, from the magazines some of the ads. The only thing I have got to say about the ads is that every one of them gives an address, every one of them is going to mail that material to whomever orders it, every one of them is going through the United States mail if it were pornographic literature or obscene literature.

Now I asked Dr. Schlafer to find some of the four-letter words. Personally, I have never understood why writers who want to describe the sex act, who want to describe something else about us that isn't usually discussed, but in some of the books that are supposed to be best sellers in this country and are recognized as good literature for some reason or other by the country, those people who are critics and are supposed to know, as presenting the realistic side of life, but there appear what we call four-letter words, vulgar words that I wouldn't repeat to you. You

know what we are talking about. Those words are not in these magazines, in either of them. They are in many best sellers today.

Now the Court has instructed you as to whether or not these magazines go substantially beyond the customary limits of candor in description or representation of such matters. In other words, you heard me ask these people whether or not these pictures when [sic] beyond the customary limits of candor, whether they show more of the body than pictures in other magazines and other publications. I am sure that all of you have seen pictures of completely [fol. 115] nude bodies in photographic magazines. I am not trying to argue whether it is morally right or morally wrong. We are talking about what is guaranteed under free speech in this country and freedom of the press. We are talking about who is going to say, who is going to limit this matter, and what standards can Mr. Austin in his business apply. Which ones would you take off? Those other magazines have a second class permit and have been approved by the Postal Department. They are the same type magazines, just as revealing in their pictures, just as desultory and just as descriptive in their stories.

The Commonwealth didn't produce any witness who said that these magazines were—he said yes, in his opinion they were worse, but he didn't testify that they revealed any more of the body. He didn't testify that the stories had any vulgar or profane words in them, and you and I know that much of the literature today has vulgar and profane words in the cause of realism, and you and I know in spite of all the preachers have attempted to do, and all of us who belong to churches have attempted to help them, we all know that that realism exists. We all know that people engage in those kinds of acts. That is what we are talking about here today, whether we are going to say, "Let us sweep it under the rug and try to turn our heads and say it doesn't exist," or are we going to say that this type of thing, if we are going to stop it, we are going to stop it all.

It isn't going to be, it must not, you have got to stay within the limits of what the ministers say. Why not set up and [fol. 116] establish a censorship board, or somebody who can tell a man what he shall or shall not read. Mr. Austin runs a public business. It is available down there to those who want something. Mechanical engineers want that type of book. I wouldn't give anything for that type of book. If he had some law books I might be interested in those. There are various things: It has to be, for a cross section of the community. There are over eleven thousand titles in that place.

What is the—the Court has instructed you if you find beyond a reasonable doubt that the magazines named in the complaint, applying contemporary community standards, that's not your standard or mine, or what we like, and if you vote for an acquittal here today that doesn't say that you like that kind of literature or that you approve of it at all. It doesn't say that you would want to read it or have it in your home. It just says that in your opinion it doesn't go beyond the contemporary standards of this whole country, what other magazines like them have in them. That would be what your decision would be. Does it appeal to the prurient interest of the average person. If you believe—if you think, if these magazines appeal to you, that they arouse any desire in you, then you bring back a verdict of guilty in this case. I don't believe this jury can say that either of these magazines appeal to any prurient interest of this jury.

The Court has instructed you, though we attempted to prove standards over the country, the Court has instructed that you have got to measure this thing on the country as a whole, not Paducah, not what is good for this community. Certainly if that were true, there would be an impossible situation. What would be permissible in May- [fol. 117] field wouldn't be permissible in Paducah, or wouldn't be permissible over in Smithland and various things of that kind. Certainly free speech and free press

can't be halted or hampered by any such thing as this. Now, in other words, do these publications go substantially, not just a little bit, but do they go substantially beyond the customary limits of candor of the country as a whole? There are pictures of burlesque shows. There are burlesque shows in every large city of this country. I didn't argue with you that they were good. I have never been to one. I don't know what they are, but I have seen the signs, I have seen the advertisements in newspapers when I have been in cities. They are there. It is a part of the contemporary standards of their country or their community as a whole, or the country as a whole. It is a part of the free speech and the free press of this country guaranteed by the Constitution, the First Amendment of the Constitution of the United States, part of the Bill of Rights that we are so fond of.

Now, let me talk to you just a minute. There isn't a word of proof in this case that Mr. Austin knew that these two magazines were down there. One of the things in the first instruction is that Mr. Austin knowingly had these magazines for sale. It is true, he had them, lots of magazines, eleven thousand titles down there for sale. But the burden is on the Commonwealth to show that this man—now how could they have done it? They could have done it very easily. Mrs. Wathen could have gone to Mr. Austin or to the woman from whom she bought them after she had looked at them and she could have said, "This magazine is offensive, obscene. I brought it to the County Attorney and he said it was obscene." Mr. Austin would have taken [fol. 118] it off of the stands, and they knew that. But no, they didn't want to do that, they wanted to prosecute him. They didn't want to give him a chance to get it off. They wanted to complain about it. They wanted the publicity. They want to make a show of it, to come into court, and cause this man, who is a respected business man in our community, to have to employ lawyers, to have to defend himself as a common criminal, never having been in court

before in his life, because they were unwilling to give him a chance. You have heard all this discussion about what is and what isn't obscene and objectionable and so forth. If it is that difficult for the experts, how can you expect a common, ordinary business man to know? How can we demand more of him? They didn't want him to know. Mrs. Wathen—it is more than passingly peculiar that she went to that news stand and asked for four magazines by name. She didn't tell you where she got the names or who insructed her to get the magazines. It doesn't matter. But it does matter that she didn't go back and call these magazines to his attention. It wouldn't have cost her anything. She wouldn't have been embarrassed. If he hadn't have taken them off of the stand then, she could have come here and testified that she asked him to remove them and he didn't do it. Then he would have known, then he would have known they were there. For even though you may find that these magazines are all that they say they are, the Court has instructed you that you must also find that Mr. Austin knew that they were there. He deserves—he deserves—what better—how many business men would say to his customers, "You tell me what is offensive to you and I will take it out of my store.?" I don't know of any. That man has eleven thousand titles down there and he [fol. 119] said it, and he said it to the preachers. Brother Simpson on cross-examination yesterday, although I had to tear it out of him, finally admitted that Mr. Austin told them that, and he finally admitted that they told Mr. Austin that they would give him a list, and he finally admitted that they never furnished him such a list, then or ever, or even up to now.

I am talking about not only the First Amendment to the Constitution of the United States, ladies and gentlemen, but I am talking about fair play. I am talking about fair play for a business man, an honorable business man of this community that deserves to have the preachers, if you please, do what they say they will do, no more. And they

should have furnished him one. Had they have furnished such a list, had they have done that, then they could have come in here and said "Mr. Austin, you were furnished a list and you didn't take it off," if there had been any debate about it. There isn't a preacher in this community that I don't respect, but I don't have to agree with the actions of all of them. And ladies and gentlemen, this is the last argument we can make here in this community about this case. Mr. Austin could have paid a fine and been through with this case a long time ago, but he didn't feel that he was guilty. Mr. Austin wants a verdict of acquittal that will say to the community that the standards of fair play in this community are higher than that. You can say to these people, "This is offensive to me," call it to his attention and let him know.

Ladies and gentlemen of the jury, I realize that I don't stand here pleading any popular cause when I am talking [fol. 120] about this type of publication, but I am talking about a larger thing than these two magazines. I am talking about the First amendment to the Constitution of the United States, and it is never tested, it is never tested by the good books. It's never tested by the honorable statements of speech. It's never tested by the pleasing statements that people make. Freedom of speech isn't ever challenged or isn't ever tested so long as you are pleasing the government that is in power, for example. It isn't ever tested when we are doing the things that please people. It is only tested by things that are not the good, not the pleasing in speech or press in public.

Peter Zengler who was tried in New York years ago for his publication, the New York Journal, and incidentally, his lawyers were put in jail because they defended him because he had some critical things to say in the magazine or newspaper about the government, yet a jury of twelve people returned a verdict of not guilty in that case. It was an unpopular verdict, but that jury and that man's name has stood in history to this day and it has been an

example of the preservation of the right of free speech and free press in this country. That is all we ask of you in this case. You don't have to explain how you reached your verdict of acquittal, but there are any number of reasons why you should return such verdict, No. 1, that you believe in that First Amendment to the Constitution of the United States; No. 2, that Mr. Austin did not know. There has been no proof and the burden of proof is on the Commonwealth to prove that he knew, read those instructions, that he knew the magazines were there; and that while these magazines may be offensive to you, Mr. [fol. 121] Austin is not guilty of committing any crime, and your verdict of not guilty will also say that these magazines do not appeal to any interest that you ladies and gentlemen have, and that you believe that Mr. Austin is an honorable business man in this community and is entitled to a verdict of not guilty at the hands of this jury, and I ask that of you.

At the close of the foregoing argument the Court recognized Mr. McMurry who gave the following argument on behalf of the Commonwealth:

May it please the Court, Mr. Williams, Mr. Apple, and Ladies and Gentlemen of the Jury, you have been mighty patient to sit here and listen to this quibbling and growling back and forth for these two days. As Mr. Williams said, this is an important case. It is not a murder case, it is not a case of breaking and entering and that kind of thing that you are used to listening to. In my opinion, it is worse. I like the way Dr. Lowry put it, sex for the sake of money, dirt for dirt. I have heard that same expression used in dope cases and selling whiskey to minors.

Mr. Williams: I object to that. There is no question about minors in this case.

The Court: The jury can consider what the statement—

Mr. McMurry: Now I didn't bother him.

The Court: He is entitled to have a reasonable argument, Mr. Williams.

Mr. McMurry: (Continuing) Mr. Austin comes in here with two defenses. First, why these magazines aren't ob-
[fol. 122] scene. They are not indecent. "But oh, maybe if they are, I didn't know they were there." I want to cover all of these points if I can and try to let you see through this web that has been spread before this jury.

In the first place, I don't hold Mrs. Katherine Wathen out as the censor of McCracken County. She is not. Neither are the ministers the censors of McCracken County, and they have got no obligation to any person to go out and censor the reading material that is on the stands in Paducah. They recognize that fact. That's a dangerous situation. But what did they do? They had a meeting, two meetings, as I recall the testimony, the last one in May of 1963, and the objection on the part of the ministers was all of the material that he called "adult reading." They objected to all of it. They weren't going to specify this issue, that issue, or some other issue. They told him that they objected to all of it, as they should. Why if they had told him they objected to the May issue of Playboy Magazine, all he would have had to do was to put those under the shelves down there, but then the June issue would be out. And that's what he wants them to do. He wants them to specify this magazine and this issue, that magazine and that issue, because there will be a new one out next month. That's exactly what he wants the ministers to do. But they told him they objected to anything he has got down there that is obscene, and in their opinion, this adult reading is obscene.

Mr. Williams: Now we object to that. There has been no proof that in their opinion the adult magazines are obscene.

[fol. 123] The Court: Mr. McMurry is entitled to argue his case without unnecessary objections.

Mr. Williams: Note our objections (To reporter).

The Court: I will let the jury consider it as being the argument of Mr. McMurry. They will have to base their

verdict upon the testimony they have heard in the case and from the exhibits which have been filed.

Mr. McMurry: (Continuing) Mr. Austin has said that he didn't have any knowledge that these two magazines were in there. He acknowledged the fact that he wrote the publisher and ordered the magazines.

Mr. Williams: Now it's not so, and your Honor, you wouldn't even let us introduce the letter and let him read the letter.

Mr. McMurry: He can testify that he wrote them in 1958 and ordered the magazines.

Mr. Williams: And the Court wouldn't permit him to read that letter that told what kind of magazines not to send.

The Court: I will not let you comment on the contents of the letter because the letter is not in evidence.

Mr. Williams: He said he wrote them and ordered the magazines. Now that's not so and there is no word of proof in this case to that effect.

The Court: I don't recall that that was the proof and I will leave that to the jury because I can't recall that it is or isn't.

Mr. McMurry: In any event, the magazines showed up here, and where did they go? They went out to operation [fol. 124] No. 1, out on the Husbands Road, Basin News Company. Who owns Basin News? William L. Austin. He has an operation out there and from that wholesale operation he distributes magazines to various retailers. There's his first shot at finding them, is out there at that business. Where did it next go? To his retail store down on Fifth Street. There he had shot No. 2 to find it. And don't you know that he knew it was there, because after the meeting with the ministers in May, he goes down there and gathers up all these girlie books, including these two, and puts them in a segregated counter behind the checkout stand, some 25 magazines. He says, "I handle eleven thousand titles." He segregated 25 of those eleven thousand and put them back behind the stand, and it bears to be remembered that any

business man ought to know what 25 titles he has segregated from the rest.

What else did he do? He stapled them put the staples in them, as well as segregating them. He had knowledge that the magazines were there, but he says, "Oh no, I am there one day a week, I am out here at Basin News one day a week." Where is he the other five days? "Just let the business run helter-skelter, let the chips fall where they may. We don't care how much we pollute Paducah or McCracken County. The business will run itself, I am off, gone." That's no defense, absolutely none.

Now Mr. Williams has alluded to the First Amendment of our Constitution, our basic freedom. And let me establish it at this early date and now, that I am as much in favor of our basic freedoms and the preservation of them as any man or woman here, and I am fully cognizant of the fact that the First Amendment of our Constitution that [fol. 125] guarantees freedom of speech, freedom of press and expression is a God-given basic American freedom. I know that many of you in this last war and other wars have fought foreign powers that would destroy that basic American freedom, and many of your loved ones perhaps gave their lives in the war. I myself lost a brother in that war and I am perfectly willing to say that I know he didn't die in vain fighting for our freedoms. Our basic American freedoms come from the Constitutional Convention of 1786, and there gathered a group of men wise beyond their years and certainly inspired by the Almighty, and set forth on paper a document that is without equal, so far as an outline of government is concerned, and those men realized that freedom ends for one person where the right of another commences, that you can't have, you just can't have freedom of movement, freedom of speech, freedom of everything, without any restrictions. They realized that. Complete freedom in that sense is simply license, and license brings on chaos and disorder. Yes, even the Supreme Court of the United States in a recent case in 1956, Roth vs. U. S., stated that implicit in the history of the First

Amendment is the rejection of the obscene or indecent as utterly without redeeming importance, and that, ladies and gentlemen, is law. You haven't got a right to go out and sell anything you want to and say you have got the freedom to do it. You haven't got the right to go out and say anything you want to and hide behind the First Amendment. If we could do that, then I could go out here and slander any member of this jury, or you could write a letter slandering your friends or your neighbors. We don't have that right. Why? Because a true democracy as ours is [fol. 126] laid out and constituted is based on laws. You have got to have laws to govern people. And that's what we are talking about here this morning. A law passed by the Legislature of Kentucky. Is there anything strange about that? We have got thousands of them. Every state in this Union has a law against the sale and distribution of obscene literature, and over 20 laws have been passed by the Federal Government on the subject, and there is an international agreement between some 50 nations as to the traffic of this trash between countries. There is nothing unusual about it, and cases like this are tried every day, every day. There is nothing unusual about it.

Now that's what we have here on law. The question is, did this man violate this law? Are these books obscene? Now you have got instructions, or will have, of the Court as to what obscene means. "As used in these instructions a particular publication is obscene which to the average, normal adult person, using contemporary community standards, finds it appeals primarily to the prurient interest," which means appeals primarily to, among other things, lewdness of, desire or thought. These magazines, High Heels and Spree—go back in your jury room and read them, read them and apply the standard that you men and women know, and come back here and tell me if they don't appeal to the lewdness of desire or thought, the prurient interest. What other interest could they appeal to? Just take them, if you will. Look through them. "British Beauty: Malvina Price . . . When Melvina isn't

rehearsing or on stage or modelling or out spending her pay on high heels, she reads and paints." Now don't you [fol. 127] know that's a die? Tell me those poses aren't suggestive! Every page in this magazine is filled with this trash. Suggestive? I would certainly think so. And you can't hide behind art and literature with this sort of thing. Turn on over, Barbara Baeno. Now look at it. Is that art or literature, or is it simply lewdness? Every page in the book, every one of them, look at this Gloria Rand on top of a building, half nude, suggestive poses. Read the ads in the magazines. "French Heels," is that kind of literature above or below the community standards? You are the ones that are going to judge it. This is the worst literature I have ever seen on the stands in Paducah, the very worst. Here is an ad, "Large Busted Young Girl Frisky Laine (46-27-38). Shudder with pleasure as her unclad seductive young body eagerly teases, pleases, shows all and leaves you breathless with delight." What is that appealing to? And ladies and gentlemen, if you know anything about the literature on the stands in Paducah, Playboy Magazine, Cavalier, are Sunday school material to this stuff. Spree, it's got a few stories in it. Now I don't know the age of this little girl, but I dare say she is not over 15 years of age. There she's pictured, half nude, suggestive pose, yes or no? This one has got one of these pull-out things. Now isn't that ridiculous? That's all that's in it, it's that kind of stuff. Read the printed matter above and below the pictures and it adds to the thought that is involved there. Read, if you will, the story, "Double Date." Dr. Lowry said it was racy but he didn't think it was obscene. That's the most ridiculous statement that has ever been made from that witness stand, and I have been here a long time.

[fol. 128] This is a story, and you can see what it's about from the pictures, a story about two couples off up somewhere swimming. They had sex relations with their particular dates, then they decided to swap. That's "Double Date." "Yeah," Jim said coaxingly. 'But one's not enough, old Buddy. A guy needs variety, or else he gets stale.'

Rhonda was directly before Barry now, swaying seductively, her full-blown body straining at the thin fabric of her dress. Barry saw that she had not bothered to put on her underclothing after the swim. He licked his lips and tried to control his breathing. His hands ached to grasp those soft, quivering breasts. 'Just say the word, old Buddy,' Jim whispered. 'Just one little word and its a deal.' With a tortured cry, half triumph, half surrender, Barry rose up and dragged the unresisting Rhonda to the day bed. He did not notice Jim lead Janet, stumbling and bleary-eyed, into the small bedroom. He had never dreamed that there could be such strength and tenacity in a woman's limbs, such urgency. Rhonda was everything that Janet was not—active, violent, impetuous. He could never have loved her, but he was grateful for the experience she gave him and the unknown parts of himself that he discovered through it." He couldn't love her, but he was thankful for the sex act. Is this the kind of thing you want on your coffee table, Mrs. Murphy, this thing? Is this the kind of thing this jury is going to tell Paducah, "You can publish this, you can pass it out and have it on your news stands."?

And I ask you, please read the ads in this magazine. This is one I asked the defendant to read and he said he didn't [fol. 129] think it was obscene, an ad for a book, "Sexual Feeling, Covers the entire field of sex in marriage, in addition to such exclusive subjects as: enlarging the erect penis, obtaining satisfaction during menstruation, obtaining satisfaction during masturbation, menstruation, penis fears of wives, overcoming problems of the too-long and too-short husband and the wife's assistance in overcoming semi-impotence." For $4.00 you can buy it, and for a dollar you can get the place to buy it from. You can go down here to Mr. Austin's and buy Spree, you can buy a copy of this book, and your own family, any member of it, can send the $4.00 in and get it.

Here's one, "Sex Adequate Female," you can get this for $2.50. "Chapters include what women should know about

sex; infidelity; the orgasm—ideal, oral-induced, masturbatory, by breast stimulation, and by penis substitutes." This is the kind of trash, and you tell me it would appeal to anything but the prurient interest? Anybody that doesn't believe that is obscene has certainly led a lewd, ridiculous life. This is obscene. They say, "Oh, it comes through the mail, these books, it comes through the mail." Ladies and gentlemen, they have tried to hoodwink this jury about the part the mails play in censoring material like this, and it's just not so. It's just not so. Obscene material comes through the mails everyday in the week, everyday of the week, and as long as it comes everyday of the week to Paducah, Kentucky, we are going to do what we can to stop it, and there is only one way to do that, and that's to return a verdict of guilty in this case.

Now yours is not an easy responsibility. The case is [fol. 130] important. It is up to you ladies and gentlemen to say what standards will be followed in Paducah and McCracken County. All you have got to do is to go back there and apply the standard you know and say to the average person, these appeal to the lewdness of thought and desire. And I say, if they don't appeal to that, what, in God's name, do they appeal to? By your verdict you can do more to clean up Paducah than by any other verdict you will ever render, in this case today. Thank you.

[fol. 131]

IN THE McCRACKEN CIRCUIT COURT

No. 9443

MINUTE ENTRY OF TRIAL—February 27, 1964

[Title omitted]

Came defendant, by counsel, and filed motion for continuance, for reasons stated in said motion, which was overruled by the Court, to which defendant objects and excepts.

Then came defendant, by counsel, and filed motion to dismiss this case, for reasons stated in said motion, which was overruled by the Court, to which defendant objects and excepts.

By agreement of parties it is stipulated that William L. Austin is the owner and operator of Readmore News Stand and was the owner and operator of Readmore News Stand on September 28, 1963.

Then came parties in open court and announced ready for trial. During the selection of a jury defendant, by counsel, moved the Court to discharge the jurors and continue this case for the reason that a reference was made by the Prosecuting Attorney that this was an Appeal from County Court, which was overruled by the Court, since no reference was made as to previous results and the purpose was to determine if any juror had attended the trial in the lower court, and both parties made repeated references to the other trial for this reason in qualifying the jury, to which defendant objects and excepts. On motion of defendant it is ordered that the questioning of the prospective jurors and the complete trial of this case from this point until the completion of the trial be reported by Miss Corinne Lowry, this Court's official Reporter.

[fol. 132] Selection of jurors being completed came the following jury:

Thomas Cornwall, B. J. Morris, Mrs. Harry Houser, James E. Parker, Fred M. Herde, Leonard A. McReynolds, Mrs. Charles R. Murphy, Grat Cox, Joe C. Gardner, Jr., Mrs. Alberta Seaton, John R. Benton and E. B. Cathey, who were legally tested, tried and accepted and the Commonwealth being in open court by attorney and defendant being in open court in person and by counsel, the jury was sworn to try the issue joined. Then came defendant, by counsel, and moved the Court to set aside the swearing of the jury and to discharge the jury and continue the case because the Court had complained to the defendant's attorney, out of the hearing of the jury, that the attorney

was taking an unduly long time with his examination of the first two jurors; however, the examination was permitted to proceed and eventually a jury was empanelled, and said motion was overruled by the Court, to which defendant objects and excepts. At the conclusion of evidence for the Commonwealth, defendant, by counsel, moved the Court for a directed verdict, which was overruled by the Court to which defendant objects and excepts. All the evidence being concluded and there not being time to complete the trial of this case, court was adjourned until 9:00 A.M. tomorrow morning under the usual admonition of the Court. During all recesses and adjournments the usual and required admonition to the jury was given by the Court.

[fol. 133]

IN THE MCCRACKEN CIRCUIT COURT

MINUTE ENTRY OF TRIAL—February 28, 1964

Came the jury empaneled herein on yesterday. Came all parties in interest and the trial of this case was resumed. At the conclusion of all the evidence, the defendant offered (51) separate instructions, some of which the Court gave or incorporated in his instructions and the remainder of which were refused, to which defendant objects and excepts. The Court gave to the jury Instructions Nos. 1, 2, 3, 4, 5, 6, 7, 8, & 9, to which both parties object and except. Ordered that all said instructions, both those offered and refused and those given by the Court, be filed and made a part of the record herein without being spread upon the order book. Argument of counsel being concluded the jury retired for deliberation and returned into open court the following verdict: "We, the jury, find the defendant, William L. Austin, guilty and fix his punishment at $250.00 fine (Two Hundred & Fifty Dollars) /s/ Fred M. Herde, Foreman".

Wherefore It Is Adjudged by the Court that the Commonwealth of Kentucky, recover of defendant, William L.

Austin, the sum of Two Hundred Fifty Dollars ($250.00) Dollars in fine, and its cost expended, for all of which capias pro fine is awarded.

Bond for the Purpose of Appeal Is Set at $350.00.

[fol. 134]

IN THE McCRACKEN CIRCUIT COURT

Criminal Action No. 9443

[Title omitted]

DEFENDANT'S REQUESTED INSTRUCTIONS—
Filed February 28, 1964

Defendant's Instruction No. 1

In order to establish the offense with which the defendant is charged, the evidence must show beyond a reasonable doubt:

1. That the dominant theme of each of the magazines named in the complaint, taken as a whole, have a substantial tendency to deprave or corrupt the average person by inciting lascivious thoughts or arousing lustful desires; and

2. That each of the magazines named in the complaint go substantially beyond customary limits of candor of representation or depiction of matters relating to sex or nudity; and

3. That each of the magazines named in the complaint is utterly without redeeming social importance; and

4. That each of said magazines named in the complaint, applying contemporary community standards, appeals to the shameful or morbid interest of the average person in sex or nudity, bearing in mind contemporary community standards; and

5. That the defendant kept for sale or sold the said magazines in question; and

6. That the defendant knew the contents of the said magazines and knew they were obscene as that term is defined herein, prior to the time he was arrested; and

7. That the defendant, in keeping for sale or selling the said magazines, had the specific intent to deprave or cor- [fol. 135] rupt the average person who might read them by arousing lascivious thoughts or lustful desires.

Alberts v. *California,* 354 US 476;
Morissette v. *United States,* 342 US 246;
Smith v. *California,* 361 US 147;

Defendant's Instruction No. 2

You are instructed that the words "corrupt" and "Deprave" are synonymous. "Corrupt" is defined as changed from a state of uprightness, correctness and truth and implies a loss of original soundness, integrity or purity; a marked or unnatural deterioration.

It cannot be said that a person is corrupt or depraved merely because sensual thoughts or emotions are aroused in him. The test of "corrupt" or "deprave" calls for a showing of an enduring deleterious influence on the average person.

Defendant's Instruction No. 3

The term "contemporary community standards" as used in these instructions are not the standard of a particular individual, group of individuals or locality, but is the standard of the contemporary society of this country at large or as a whole.

Defendant's Instruction No. 4

If you do not find beyond a reasonable doubt that the magazines named in the complaint go substantially beyond

customary limits of candor in representations of matters relating to sex, you should find the defendant not guilty.

Defendant's Instruction No. 5

If you do not find beyond a reasonable doubt that the [fol. 136] magazines named in the complaint, applying contemporary community standards appeal to the prurient interest of the average person, you should find the defendant not guilty.

Defendant's Instruction No. 6

If you do not find beyond a reasonable doubt that the defendant kept for sale or sold the magazines mentioned in the complaint, knowing the contents of the magazines and knowing them to be obscene, you should find the defendant not guilty.

Smith v. *California*, 361 US 147, 4 L Ed 2d 205

Defendant's Instruction No. 7

If you do not find beyond a reasonable doubt that the defendant at the time of keeping for sale or selling each of the magazines named in the complaint knew that the said magazines applying contemporary community standards had a substantial tendency to corrupt or deprave the average person by inciting lascivious thoughts or arousing lustful desires, you should find the defendant not guilty.

Defendant's Instruction No. 8

If you do not find beyond a reasonable doubt that at the time of the keeping for sale or sale of the said magazines named in the complaint, the defendant, with knowledge of the nature and obscene character of the magazines, had the specific intent to deprave or corrupt the average person who might read them by inciting lascivious thoughts or arousing lustful desires, you must find the defendant not guilty.

Defendant's Instruction No. 9

Material is obscene if, and only if, it has a substantial tendency to corrupt or deprave the average person by in- [fol. 137] citing lascivious thoughts or arousing lustful desires and substantially exceeds the limits of candor set by community standards in representation of matters relating to sex, nudity or excretion, and appeals to the shameful or morbid interest of the average person in such matters, and is utterly without redeeming social importance.

Defendant's Instruction No. 10

If the magazines in question are not obscene as I have defined that term for you herein, then the magazines are lawful even if you believe them to be in bad taste, shocking, disgusting, embarrassing, vulgar, noxious, immoral or objectionable.

Hannegan v. *Esquire*, 327 US 146

Defendant's Instruction No. 11

If the material in question does not substantially exceed the limits of candor set by contemporary community standards then it is not obscene because where liberty of speech and press are at issue the community cannot condemn that which it generally tolerates.

Mr. Justice Harlan Concurring in *Smith* v. *California*, *Supra*

Defendant's Instruction No. 12

The test of obscenity under that statute herein is *not* whether the material will have a potentially deleterious influence upon youth. The adult population of the community cannot be reduced to reading, seeing or hearing only what is fit for children. The appeal of the material

involved herein must be measured only by its appeal to the average adult person.

Butler v. *Michigan,* 352 US 380

Defendant's Instruction No. 13

In judging obscenity, it is the impact of the work on the average normal adult that counts. To measure a work by [fol. 138] its impact on youth or peculiarly susceptible persons is unduly restrictive. If you find that the works in question do not have a substantial tendency to corrupt or deprave an average normal adult, then you must find the defendant not guilty.

Butler v. *Michigan, supra*
Roth v. *United States,* 354 US 476

Defendant's Instruction No. 14

You may not convict the defendant if you find the material considered as a whole offends only the sense of propriety, morality or decency of the average person. The statute does not purport to proscribe material which allegedly offends such feelings, and the free speech provisions of the Constitution do not permit it.

Mounce v. *United States,* 355 US 180

Defendant's Instruction No. 15

You are instructed that if you find that the material in question is not obscene within the legal meaning of that term, then regardless of any and all other circumstances you must find the defendant not guilty.

Defendant's Instruction No. 16

You may not rely on instinct in determining whether the material charged in the complaint is obscene. The ascertainment of obscenity cannot be a merely subjective re-

flection of the taste or moral outlook of individual jurors. The determination of obscenity cannot be made on the basis of the personal upbringing or restricted reflection or particular experience of life of the individual juror. If you cannot determine objectively, beyond a reasonable doubt, that the material in question is obscene, as I have defined it, you should find that defendant not guilty.

Mr. Justice Frankfurter concurring in *Smith* v. *California, supra*

[fol. 139] Defendant's Instruction No. 17

Obscenity laws must be restricted to activity which can be defined with precision so as not to endanger the creators, publishers and distributors of unconventional themes or material, or impose an official morality, or reduce the legel [sic] of material to that fit for children.

It is, of course, not your duty to judge the artistic merit of the material before you.

Defendant's Instruction No. 18

The sole test for determining the "obscenity" of material is the one the Court has given you. The mere fact that you find the material is not "obscene", if you so find, does not mean that you endorse every idea or presentation contained in the material, nor are you required to do so. It would conflict with the public interest for each individual juror to establish his own political moral or aesthetic views as the sole standard for determining what material should be circulated.

Roth v. *United States*, 354 US 476

Defendant's Instruction No. 19

If you find that the defendant had a good faith belief that the magazines in question were not obscene, you must

acquit the defendant even if you personally believe that the magazines are obscene.

Smith v. *California, supra;*
Continental Can Co. v. *United States,* 272 F. 2d 312

Defendant's Instruction No. 20

In this case the commonwealth must prove beyond a reasonable doubt that the defendant had a specific intent to violate the law. You may not infer the specific intent merely on the basis of suspicion, conjecture or surmise, and if you upon all of the evidence you are not satisfied beyond a reasonable doubt that the defendant had such a specific intent you should find the defendant not guilty.

Smith v. *California, supra*

[fol. 140] Defendant's Instruction No. 21

Unless and until outweighed by evidence to the contrary, the law presumes that a person is innocent of crime or wrong; that private transactions have been fair and legal; that the ordinary course of business have been followed, and that the law has been obeyed.

Defendant's Instruction No. 22

The state of mind of the defendant can only be established by his own acts and declarations, and cannot be imputed to him by the acts and declarations of others.

Keegan v. *United States,* 325 478 [sic]

Defendant's Instruction No. 23

In every crime there must exist a union or joint operation of act and intent. The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt.

Defendant's Instruction No. 24

Our society plainly tolerates a great deal of erotic interest in pictures, literature, advertising, recordings, and art in the mass media. This tolerance is not limited to the conventional or orthodox, but includes the unusual and even the bizarre. You may not convict the defendant here if you find that the material charged in the complaint does not go substantially beyond what is tolerated in our society, considering the nation as a whole.

American Law Institute, *Tentative Draft* No. 6, p. 10; Mr. Justice Harlan concurring in *Smith* v. *California, supra*

Defendant's Instruction No. 25

In judging obscenity it is necessary to take into account "contemporary community standards." This means what is going on in the community, not necessarily what ought to be going on.

[fol. 141] *Alberts* v. *California, supra;*
Roth v. *United States, supra;*
Smith v. *California, supra;*

Defendant's Instruction No. 26

The mere fact that the material herein may appeal to prurient interest, if you should so find, does not necessarily stamp it as "obscene." In addition, the appeal to prurient interest must go substantially beyond customary limits of candor in description or representation. The term "customary limits of candor" recognizes that customs change; that the community tolerates much that particular segments of the population might regard as appealing to prurient interest.

American Law Institute, *Model Penal Code, Tent. Draft* No. 6

Defendant's Instruction No. 27

In determining community standards you have a right to consider that discussions of sex and the realistic portrayal of sex and sex relations appear candidly and openly in the daily newspapers, in the motion pictures, in the theater, on television, in books, magazines, pamphlets, music, song and the dance; in fiction and scientific works, and manuals; in all media of communication.

Smith v. *California, Supra*

Defendant's Instruction No. 28

People differ widely in their tastes with regard to material such as that charged in the complaint. What may be bad taste or offensive to some people will turn out to be amusing or entertaining to others. Obscenity is not a matter of taste. The mere fact that you may find the material here in question offensive or in bad taste constitutes no sufficient basis for a finding that the material is obscene.

Hannegan v. *Esquire, supra.*

[fol. 142] Defendant's Instruction No. 29

In applying present day community standards, you have a right to consider what is commonly accepted today by the average person on television, in the motion pictures, in records, in newspapers, advertisements, in music, in songs, in the dance, art magazines, joke books, novels, burlesque, and all other media of communication.

Alberts v. *California, supra;*
Smith v. *California, supra;*

Defendant's Instruction No. 30

I instruct you that in considering contemporary community standards you should take into account the disposition

courts have made of cases dealing with material similar to that involved in this case.

American Law Institute, *Model Penal Code, Tent. Draft,* No. 6, p. 42.

Defendant's Instruction No. 31

The free speech provisions of the Constitution of the United States guarantee accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. A requirement that literature or art conform to some norm prescribed by an official smacks of ideology foreign to our society. From the multitude of competing offerings the public will pick and choose. What seems to one to be trash will have for another some fleeting or even enduring values.

Hannegan v. *Esquire,* 327 U.S. 146

Defendant's Instruction No. 32

A work designed to entertain, amuse, or consider the unusual is as much entitled to the protection of free speech as a scientific or educational work.

[fol. 143] *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495
Winters v. *New York,* 337 U.S. 507
Smith v. *California, supra*

Defendant's Instruction No. 33

No arm of government—and that includes you acting as jurors—has the power to suppress communications by subjective rather than by confining objective standards. You may not make your personal opinion the rule of judgment and approve or condemn the material as it shall square with or differ from your own.

Thornhill v. *Alabama, supra*
Near v. *Minnesota,* 283 U.S. 713
Smith v. *California, supra,* Mr. Justice Frankfurter concurring.

Defendant's Instruction No. 34

Sex and obscenity are not synonymous. All subjects, including those dealing with sex, homosexuality, sexual variations are proper subjects for all media of communication. Communications dealing with these subjects are within the broad protection of freedom of speech and press even if you believe they are of no value to society, provided, however, they are not obscene as I have defined that term for you.

Defendant's Instruction No. 35

Your own personal and social views on material such as that charged in the complaint may not be considered. Thus, whether you believe that the material is good or bad is of no concern; so too you may not consider whether in your opinion the material is moral or immoral; whether it is likely to be helpful or injurious to the public morals. Similarly, whether you like or dislike the material; whether it offends or shocks you, may not be considered by you. You may think the material is immoral, shocking or offensive and yet you must acquit the defendant if it is not obscene as the Court has defined that term for you.

Smith v. *California, supra,* Mr. Justice Frankfurter concurring.

[fol. 144] Defendant's Instruction No. 36

While the statute in question uses the term "obscene and indecent," and while the term "indecent" has a broader dictionary meaning than the term "obscene," I instruct you that its legal meaning is identical to that of the term obscene. Unless the magazines can be found to be obscene

as that term is defined in law, no crime has been committed even if it may be felt that the magazines are indecent.

Commercial Pictures Corp. v. *Regents,* 346 U.S. 587.

Defendant's Instruction No. 37

The mere fact that a magazine may offend the views of a majority of the people is no sufficient reason to find it obscene. The guarantees of the Constitution are not confined to the expression of ideas that are conventional or shared by a majority. The constitution protects the portrayal of ideas and pictures that are offensive and even hateful.

Kingsley International Pictures Corp. v. *Regents,* 360 U.S. 684

Defendant's Instruction No. 39

The term "prurient" means a shameful and morbid interest in sex.

It cannot be said that a prurient interest has been aroused in an average person merely because sensual thoughts or emotions are aroused in him.

[fol. 145] Defendant's Instruction No. 40

The law does not attempt to regulate matters which merely depend on taste, manners, aesthetics or artistic skill. If you find that the material charged in the complaint is merely in poor taste or vulgar or shocking you may not find it to be obscene.

Defendant's Instruction No. 41

You may not convict the defendant if you find that the material considered as a whole offends only the sense of propriety, morality and decency of the average person. The statute does not purport to proscribe material which allegedly offends such feelings and the free speech provisions of the Constitution do not permit it.

Mounce v. *United States,* 355 U.S. 180.

Defendant's Instruction No. 42

I instruct you further that you are not permitted, on circumstantial evidence alone, or when the case of the Commonwealth rests substantially on circumstantial evidence to find the defendant guilty of the crime charged against him unless that proved circumstances not only are consistent with the hypothesis that the defendant is guilty of the crime, but are irreconcilable with any other rational conclusion.

Defendant's Instruction No. 43

When the case which has been made out by the Commonwealth against a defendant rests entirely or chiefly on circumstantial evidence, and in any case before the jury may find a defendant guilty basing its finding solely on such evidence, each fact which is essential to complete a chain of circumstances that will establish the defendant's guilt must be proved beyond a reasonable doubt.

Defendant's Instruction No. 44

It is important that you remember that you as jurors must find facts and not express opinions. You must not regard yourselves as a board of censors. You are to decide [fol. 146] only whether the material is obscene, as I have defined that term, and whether the defendant acted wilfully and lewdly in keeping for sale or selling the material.

Defendant's Instruction No. 45

There is a considerable difference between that which shocks and disgusts and that which corrupts and depraves. Therefore, the mere fact that you may be shocked or disgusted does not render the material obscene in law.

Defendant's Instruction No. 46

In approaching your task as jurors in this case you must act as men and women of the world, not with prudish minds,

but with liberal minds, recognizing that there is much material on the market which we as individuals do not like, but which nevertheless a free society must tolerate.

Defendant's Instruction No. 47

I instruct you that none of the words used in any of the material charged in the complaint are in and of themselves obscene in law. There are many words which are considered in bad taste and vulgar but as a matter of law no word in and of itself can be said to have a substantial tendency to corrupt or deprave an average person, hence, no word in and of itself can be obscene.

Grove Press, Inc. v. *Christenberry,* 175 F. Supp. 488

Defendant's Instruction No. 48

You have no right to return a verdict which is not based upon evidence introduced in this trial. You may not return a verdict of guilt based upon surmise, opinion or guess work.

Defendant's Instruction No. 49

When you are considering whether the material charged in the complaint has a tendency to corrupt or deprave an average person you should, of course, keep in mind the climate of our present day society. If you find that our society tolerates more today with regard to the descrip-
[fol. 147] tion or representation of matters pertaining to sex than was tolerated in earlier times, this fact should be taken into account by you.

Regina v. *Penguin Books, Ltd.*

Defendant's Instruction No. 50

The law presumes the defendant in this case to be innocent of any offense until he is proven guilty beyond a reasonable doubt, and if upon the whole case you have a

reasonable doubt as to his guilt or as to any material factor necessary to establish his guilt, then you will find the defendant not guilty.

Defendant's Instruction No. 51

A unanimous verdict is required in this case. If you reach a verdict, however, it shall be necessary for only one of you to sign the verdict as the foreman.

[File endorsement omitted]

[fol. 148]

IN THE McCRACKEN CIRCUIT COURT

[Title omitted]

INSTRUCTIONS TO THE JURY—Filed February 28, 1964

1. If the jury believe from the evidence in this case beyond a reasonable doubt that the defendant, William L. Austin as the owner and operator of Readmore News Stand, did on the 28th day of September 1963 at said place of business in Paducah, McCracken County, Kentucky, knowingly have for sale or in his possession there with the intent and purpose that same be sold the two magazines referred to in the evidence and filed therein as Commonwealth Exhibit 1 and 2, that on said date and on the occasion mentioned in the evidence said magazines were sold to Catherine Wathen by an employee of said defendant, that said employee had been authorized by defendant to sell said magazines and had assented to the sale of them, and that the defendant had knowledge of the contents and the character of said magazines, and if you further believe beyond a reasonable doubt that said magazines or either of them were obscene and of an indecent character, you will find the defendant guilty as charged and fix his punishment at a fine of not less than $50.00 nor more than $500.00 or imprison him for not more than six months, or both so fine and imprison him.

2. As used in these instructions a particular publication is obscene which to the average normal adult person using contemporary community standards finds appeal primarily to the prurient interest, which means an appeal primarily [fol. 149] to lasciviousness, baseness, or lewdness of desire or thought.

3. As used in these instructions the word indecent means anything which is lewd or lascivious, obscene or grossly vulgar, unbecoming, unseemly and unfit to be seen or heard.

4. The test in each case is the effect of the magazines in question when considered as a whole, not upon any particular class but upon all these whom they are likely to reach. The magazines in question must be judged as a whole in their entire context and you are not to consider detached or separate portions except in their relationship to the entire magazine. You must judge the magazines in question which have been put in evidence by contemporary community standards. You must consider whether the literature is patently offensive according to the contemporary community standards; whether the literature taken as a whole goes substantially beyond the customary limits of candor in description or representation of such matters, and whether taken as a whole its predominant appeal is to the prurient interest. You may ask yourselves do they offend the common conscience of the community by contemporary community standards based upon your finding of what is the common conscience of the community as a whole under contemporary community standards.

5. The term "contemporary community standards" as used in these instructions are not the standard of a particular individual, group of individuals or locality, but it is the standard of the contemporary society of this country at large or as a whole.

6. If you do not find beyond a reasonable doubt that the magazines named in the complaint, applying contemporary community standards, appeal to the prurient inter-

est of the average person, you should find the defendant not guilty.

[fol. 150] 7. In judging obscenity, it is the impact of the work on the average normal adult that counts. To measure a work by its impact on youth or peculiarly susceptible persons is unduly restrictive. If you find that the works in question do not have a substantial tendency to corrupt or deprave an average normal adult, then you must find the defendant not guilty.

8. The law presumes the defendant in this case to be innocent of any offense until he is proven guilty beyond a reasonable doubt, and if upon the whole case you have a reasonable doubt as to his guilt or as to any material factor necessary to establish his guilt, then you will find the defendant not guilty.

9. A unanimous verdict is required in this case. If you reach a verdict, however, it shall be necessary for only one of you to sign the verdict as the foreman.

C. Warren Eaton, Judge, McCracken Circuit Court.

[File endorsement omitted]

[fol. 153]

IN THE MCCRACKEN CIRCUIT COURT

MOTION TO SET ASIDE VERDICT AND DISMISS COMPLAINT—Filed March 5, 1964

The defendant moves the Court to set aside the verdict rendered by the jury on February 28, 1964, and to dismiss the complaint on the following grounds:-

1. That the evidence plainly shows that the magazines themselves were within the limits protected by the First and Fourteenth Amendments of the Constitution of the United States and are not obscene.

2. That the Commonwealth failed to produce any evidence as to community standards or that the publications charged here went beyond the customary limits of candor in matters relating to sex or nudity.

3. That the statute under which the defendant was prosecuted is unconstitutional as violating the Fourteenth Amendment of the Constitution of the United States because it relieves the Commonwealth of the duty to prove knowledge on the part of the defendant of the fact of the obscenity of the magazines if obscene they were, and that he knew of their being sold in the store.

Chas. A. Williams, James G. Apple, Broadway at Seventeenth, Attorneys for Defendant.

Proof of Service (omitted in printing).

[File endorsement omitted]

[fol. 154]

IN THE MCCRACKEN CIRCUIT COURT

MOTION FOR NEW TRIAL—Filed March 5, 1964

Defendant moves the Court to set aside the verdict and grant a new trial in this action and for grounds for same states:

1. That the Court erred in admitting evidence for the Commonwealth over the objection of the defendant which was incompetent and in refusing to admit on the part of the defendant evidence which was competent, relevant and material.

2. The Court instructed the jury under instruction No. 5 that "community standards meant the standard of the contemporary society of the country at large or the country as a whole" and while this was a correct instruction the court had during the course of the trial refused to admit proof as to what the community standards were. It should

further be noted that the Commonwealth was not required to sustain any burden of proof in this regard.

3. The Court refused to permit the introduction of, for consideration by the jury, literature and photographs which went beyond the limits exhibited in the two magazines in question and which would have reflected contemporary community standards and shown conclusively that the contemporary community standards tolerated literature going far beyond that exemplified by the magazines in question.

[fol. 155] 4. That the Court erred in refusing to permit exhibition to the jury of a portion of the record of a case which was held by the Supreme Court of the United States to be within the protective shelter of the First and Fourteenth Amendments to the Constitution of the United States.

5. The instructions of the Court do not properly tell the jury that if they found that the defendant did not know that the magazines were obscene and that they were being offered for sale, then it was the obligation of the jury to return a verdict of acquittal.

6. Under the instructions given by the Court the jury would have been unable to arrive at a proper verdict since there was insufficient evidence before the jury on which it could base its opinion under the instructions.

Chas. A. Williams, James G. Apple, Broadway at Seventeenth, Paducah, Kentucky, Attorneys for Defendant.

Proof of Service (omitted in printing).

[File endorsement omitted]

[fol. 156]

[Title omitted]

MINUTE ENTRY OF ORDER OVERRULING DEFENDANT'S MOTION TO SET ASIDE VERDICT AND DISMISS COMPLAINT—March 9, 1964

The defendant having filed his motion to set aside the verdict rendered by the jury on February 28, 1964, and to dismiss the complaint against him, and said motion having been considered by the Court and the Court being sufficiently advised does hereby overrule said motion to which ruling the defendant objects and excepts.

[Title omitted]

MINUTE ENTRY OF ORDER OVERRULING MOTION FOR NEW TRIAL—March 9, 1964

The defendant having filed his motion to set aside the verdict and to grant a new trial in this action, and said motion having been considered by the Court and the Court being sufficiently advised, does hereby overrule said motion, to which ruling the defendant objects and excepts.

.....

[fol. 157]

IN THE McCRACKEN CIRCUIT COURT

Criminal Action No. 9443

[Title omitted]

NOTICE OF APPEAL—Filed March 14, 1964

Notice is hereby given that the defendant, William L. Austin, hereby appeals to the Court of Appeals of Kentucky from the judgment entered against him on February 28, 1964, rendered upon the verdict of the jury in this case on the same date, finding the defendant guilty of selling and offering for sale obscene literature in violation of KRS 436.100, and setting his fine at $250.00, and the Order of court overruling defendant's motion for a new trial, defendant's motion for new trial having been overruled by order entered on March 9, 1964.

Chas. A. Williams, Broadway at Seventeenth, Paducah, Kentucky, Attorney for Defendant.

Proof of Service (omitted in printing).

[File endorsement omitted]

[fol. 158] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 159]

IN THE COURT OF APPEALS OF KENTUCKY

File # S-60-64

Dist # 1

Bond Required

"Offering Obscene Literature for Sale"

WILLIAM L. AUSTIN,

vs.

COMMONWEALTH OF KENTUCKY.

DOCKET ENTRIES

1 vol. ($21.20)

May 11, 1964	Filed Tax Paid. Appeal by notice. Attest: Drexell R. Davis, C. C. A. By John C. Scott D. C.
May 11, 1964	Appellant filed Transcript of Evidence (1 vol.) also 1 Box of Exhibits filed in file Room
May 11, 1964	Appellant filed notice and motion for appeal
June 17, 1964	Agreed motion filed for ext. of time of 60 days to and incl. Aug. 19, 1964, for appellant to file brief. Sustained JBM ah 6-17-64.
August 17, 1964	Appellant filed briefs and notice
Sept. 23, 1964	Appellee filed not. and mot. for ext. time to and incl. Nov. 15, 1964, to file briefs. 10-5-64 Sustained JBM ah

November 13, 1964	Appellee filed briefs and notice
November 13, 1964	Submitted
November 27, 1964	Appellant filed not. and mot. for ext. time of 20 days from Dec. 3, 1964, to file reply briefs Sustained JBM ah 12-2-64
Dec. 23, 1964	Appellant filed reply briefs and notice.
January 18, 1965	Appellant filed notice and motion for oral argument
Jan. 22, 1965	Per Curiam Opinion Delivered (Moremen, C. J. dissenting) Motion for Appeal Overruled.
Feb. 18, 1965	Appellant filed notice and motion to reconsider its per curiam opinion of Jan. 22, 1965.

McCracken County.
Hon. C. Warren Eaton, Judge.
Courthouse, Paducah, Kentucky.

John B. Browning, Asst. Atty. Gen., Hon. Robert F. Matthews, Atty. General, Hon. Albert Jones, Commonwealth Atty., Courthouse, Paducah, Kentucky, Attorneys for Appellee.

Hon. Charles A. Williams, Broadway & Seventeenth Streets, Paducah, Kentucky, Attorney for Appellant.

[fol. 160]

Page # 2

No Bond Required

File No. S-60-64

81645

Dist. # 1

"Offering Obscene Literature for Sale"

WILLIAM L. AUSTIN,

vs.

COMMONWEALTH OF KENTUCKY.

Appellee	Appellant
Trans.	Trans. .....
C. C. A. 8.55	C. C. A. 12.95
Atty. 20.00	Atty. .....
Fee Book No. 45	Page 445

November 13, 1964	Submitted
January 22, 1965	Per Curiam Opinion Delivered (Moreman, C. J. Dissenting) Motion for Appeal Overruled.
March 2, 1965	Court order delivered Overruling Motion for Oral Argument and Motion to Reconsider Be Treated as Petition for Rehearing.
March 8, 1965	Appellee filed response and notice to petition for reh. (Motion to Reconsider treated as such)
Mar. 19, 1965	Mandate Issued

July 15, 1965	Appellant filed Designation of Record to the Supreme Court of the United States.
July 28, 1965	Appellant filed not. & mot. to withdraw exhibits to take to Supreme Court
July 28, 1965	Court Order Delivered Granting that Exhibits Be Sent to Supreme Court by Clerk of Court of Appeals.

[fol. 161]

IN THE COURT OF APPEALS OF KENTUCKY

[Title omitted]

STATEMENT OF APPEAL—Filed May 11, 1964

1. The name of the appellant is William L. Austin. The name of the appellee is Commonwealth of Kentucky.

2. Counsel for the appellant is Charles A. Williams, Broadway at Seventeenth, Paducah, Kentucky.

3. Counsel for the appellee are Albert Jones, Commonwealth Attorney, County Court House, Paducah, Kentucky, and Robert Matthews, Attorney General of Kentucky, Capitol Building, Frankfort, Kentucky.

4. The trial judge was the Honorable C. Warren Eaton, McCracken Circuit Court, County Court House, Paducah, Kentucky.

5. The judgment appealed from was entered February 28, 1964, and appears on page 11 of the transcript of the record. Appellant also appeals from the order of the court overruling his motion for a new trial which was entered March 9, 1964 and appears on page 33 of the transcript of the record.

6. Notice of appeal was filed on March 14, 1964, and appears on page 1 of the transcript of the record.

[fol. 162] 7. This appeal is being prosecuted under KRS 21.140 (2) and the appellant is free on bond.

Chas. A. Williams, Broadway at Seventeenth, Paducah, Kentucky, Attorney for Appellant.

Proof of Service (omitted in printing).

[File endorsement omitted]

[fol. 163]

IN THE COURT OF APPEALS OF KENTUCKY

[Title omitted]

MOTION FOR APPEAL—Filed May 11, 1964

Pursuant to KRS 21.140 (2) appellant respectfully moves the court that they grant him an appeal in this case from the final judgment of the McCracken Circuit Court, McCracken County, Kentucky, imposing upon him a fine of $250.00.

Chas. A. Williams, Broadway at Seventeenth, Paducah, Kentucky, Attorney for Appellant.

Proof of Service (omitted in printing).

[File endorsement omitted]

[fol. 164]

IN THE COURT OF APPEALS OF KENTUCKY

File No. S-60-64

[Title omitted]

MOTION FOR ORAL ARGUMENT—Filed January 18, 1965

Appellant moves the court to grant an oral argument in the above styled action and for grounds for same states that due to the vast number of Federal cases that have been decided and the complexity of the problem, it would be fair to the court and the litigants to have oral argument in this action.

Chas. A. Williams, Broadway at Seventeenth, Paducah, Kentucky, Attorney for Appellant.

Proof of Service (omitted in printing).

[File endorsement omitted]

[fol. 165]

IN THE COURT OF APPEALS OF KENTUCKY

WILLIAM L. AUSTIN, Appellant,

v.

COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from McCracken Circuit Court, C. Warren Eaton, Judge.

PER CURIAM OPINION OVERRULING MOTION FOR APPEAL—January 22, 1965

Motion for an appeal from a judgment of conviction of offering obscene literature for sale contrary to KRS 436.100 and imposing a fine of $250.00 and costs.

We find no error in the trial, and the motion for an appeal is overruled.

Moremen, C.J., dissenting.

Attorney for Appellant:

Charles A. Williams, Paducah, Kentucky.

Attorneys for Appellee:

Robert F. Matthews, Atty. Gen., John B. Browning, Asst. Atty. Gen., Frankfort, Kentucky;

Albert Jones, Commonwealth Atty., Paducah, Kentucky.

[fol. 167] Certificate of service (omitted in printing).

[File endorsement omitted]

[fol. 169]

IN THE COURT OF APPEALS OF KENTUCKY

File No. S-60-64

[Title omitted]

MOTION TO RECONSIDER—Filed February 18, 1965

Appellant moves the court to reconsider its per curiam opinion of January 22, 1965, in this action in which it overruled appellant's motion for an appeal and by the same action denied appellant's motion for oral argument, with Chief Justice Moremen dissenting.

For grounds for said motion appellant states:

1. That apparently the case was lightly treated due to the fact that there was a $250.00 fine for the court overruled the motion for appeal and denied motion for oral argument.

2. The per curiam opinion of the court lays down no guide lines for future defendants or for the appellant who is in the business of operating a bookstore as to what is obscene and what is not, particularly in view of the decisions of the United States Supreme Court, which seem to be in direct conflict with the ruling of this court.

[fol. 170] 3. It is believed that the motion for oral argument should have been sustained and this court should have thoroughly gone into the problem since the citizens of this state should know in what manner the court of last resort of this state distinguishes these magazines from the magazines and publications considered in the many cases cited by the appellant *and the Commonwealth* in their briefs.

4. The appellant and others who may be in a similar position like his in Kentucky have no compass to point the way for them to conduct their business if this decision of this court is permitted to stand.

5. The decision of this court gives no chart or ground rules for the trial of obscenity cases in view of the trial court's ruling in this case which *did not require the Commonwealth to show what the community standards were* as is plainly required by the decisions by the United States Supreme Court cited in appellant's brief and further *prevented the appellant (defendant below) from offering proof to show what had been accepted by the community.* This, when considered with the standards laid down in the case of *Roth* v. *United States,* 354 U.S. 476, 1 L. Ed. 2d 1498, as was reiterated in *Jacobellis* v. *Ohio,* 378 U.S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793, certainly would seem to entitle business men, and their lawyers, to know what shall and what shall not be admissible in the trial of an obscenity case in the future.

[fol. 171] In summary, if this court lets its ruling of January 22, 1965 in this action stand, it is in effect saying to the booksellers of Kentucky that:

1. This court refuses to lay down guide lines.

2. That the possession in a bookstore requires them to know that which is obscene and they must limit the quantity of books to what they can inspect and examine which is exactly contradictory to the ruling of the United States Supreme Court in the case of *Smith* v. *California,* 361 U.S. 147, 4 L. Ed. 2d 205. They must also try to segregate the obscene from the proper with almost impossible rules to guide them.

3. Even though this court has not laid down any guide lines, booksellers are presumed to know the content of every book offered for sale and even though it, or more offensive literature, has been approved by courts in other states or by the Supreme Court of the United States, they are still subject to the hazards of prosecution in the courts of Kentucky since this court has not said that it will follow the guide lines laid down by the Supreme Court of the United States.

Movant therefore urges the court to reconsider its ruling and to set this matter for oral argument so that the appellant may save an adequate day in court and so that this court may avoid much further litigation by settling this question once and for all.

[fol. 172] Since filing appellant's brief and reply brief, the case of *Ellenberg* v. *State*, 1964, Tennessee, 384 S.W. 2d 29, has been decided by the Supreme Court of Tennessee, holding its obscene literature statute unconstitutional and it is thought this is pertinent to the case at Bar.

Wherefore appellant moves this court to set aside its order of January 22, 1965, and set the matter of the motion for appeal down for oral argument and that the motion for appeal be granted and that the case be considered on its merits.

Respectfully submitted,

Chas. A. Williams, Broadway at Seventeenth, Paducah, Kentucky, Attorney for Appellant.

[fol. 173]

APPENDIX A TO MOTION TO RECONSIDER

Rendered: January 22, 1965

COURT OF APPEALS OF KENTUCKY

WILLIAM L. AUSTIN, Appellant,

v.

Appeal from McCracken Circuit Court

C. Warren Eaton, Judge

COMMONWEALTH OF KENTUCKY, Appellee.

Per Curiam

Motion for an appeal from a judgment of conviction of offering obscene literature for sale contrary to KRS 436.100 and imposing a fine of $250.00 and costs.

We find no error in the trial, and the motion for an appeal is overruled.

Moremen, C.J., dissenting.

Attorney for Appellant: Charles A. Williams, Paducah, Kentucky.

Attorneys for Appellee: Robert F. Matthews, Atty. Gen., John B. Browning, Asst. Atty. Gen., Frankfort, Kentucky; Albert Jones, Commonwealth Atty., Paducah, Kentucky.

[fol. 174]

IN THE COURT OF APPEALS OF KENTUCKY

[Title omitted]

ORDER OVERRULING MOTION FOR ORAL ARGUMENT—
March 2, 1965

It Is Ordered by the Court that appellant's motion for an oral argument be overruled and that the "Motion to Reconsider" be accepted and treated as a petition for rehearing.

Entered this March 2, 1965

John R. Moremen, Chief Justice.

[fol. 176] Certificate of Service (omitted in printing).

[File endorsement omitted]

[fol. 178]

IN THE COURT OF APPEALS OF KENTUCKY

File No. S-60-64

RESPONSE TO PETITION FOR REHEARING—
Filed March 8, 1965

Statement

The order of the Court entered March 2, 1965, in this case rules that appellant's "Motion to Reconsider" shall be accepted and treated as a petition for rehearing. Appellee makes the following response to the petition for rehearing:

I. Appellant Does Not Point Out Any Material Facts Overlooked or a Controlling Decision Not Taken Into Account, and the Petition for Rehearing Presents Nothing New.

Appellant does not point out any material facts which may have been overlooked in the briefs originally filed by the parties. The only new case cited for consideration is *Ellenberg* v. *State,* 384 S.W. 2d 29 (Tenn., 1964) in which the Supreme Court of Tennessee held the obscene literature statute of that state unconstitutional. However, that decision involved a statute which clearly did not require the element of scienter for conviction, whereas KRS 436.100 expressly requires that the bookstore operator have had knowledge of the contents of the literature sold.

II. Appellee Has No Objection to Noting What Standards Used for Decision.

Heretofore the law in Kentucky as to obscene literature was contained in the case of *King* v. *Commonwealth,* 313 [fol. 179] Ky. 741, 233 S.W. 2d 522 (1950) which set out standards for determining obscenity. This decision, of course, has been superseded by the Supreme Court opinions in the Roth, Manual Enterprises and Jacobellis cases. New constitutional standards for judging obscenity were proclaimed in those cases.

Although we think the record shows that the lower court correctly applied the Supreme Court tests, it probably would not hurt anything if the Court simply noted in its order that it had evaluated the motion for appeal according to the standards set out in the latest Supreme Court cases.

Conclusion

The petition for rehearing raises nothing new in the way of facts or law and must be overruled.

Respectfully submitted,

Robert Matthews, Attorney General, By John B. Browning, Assistant Attorney General.

[fol. 180]

IN THE COURT OF APPEALS OF KENTUCKY

Style: Austin v. Commonwealth
County: McCracken

ORDER OVERRULING MOTION TO RECONSIDER

Original Opinion—Judge: Per Curiam

Motion to Reconsider—Judge: Waddill

(Appellants) Overruled

[fol. 181] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 182]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1964

WILLIAM L. AUSTIN, Petitioner,

vs.

KENTUCKY.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—June 8, 1965

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including August 16, 1965.

Potter Stewart, Associate Justice of the Supreme Court of the United States.

Dated this 8th day of June, 1965

[fol. 183]

SUPREME COURT OF THE UNITED STATES

No. 453, October Term, 1965

WILLIAM L. AUSTIN, Petitioner,

v.

KENTUCKY.

ORDER ALLOWING CERTIORARI—April 25, 1966

The petition herein for a writ of certiorari to the Circuit Court of McCracken County of the Commonwealth of Kentucky is granted, limited to Question 2 presented by the petition which reads as follows:

"2. Whether Section 436.100 of Kentucky Revised Statutes, on its face and as construed and applied, abridges freedoms of speech and press and arbitrarily deprives persons, including petitioner, of liberty without due process of law contrary to the provisions of the First, Fifth and Sixth Amendments as subsumed into the due process provisions of the Fourteenth Amendment to the Constitution, because:

(a) the statute arbitrarily and capriciously provides that the sale of any publication found to be obscene 'shall be prima facie evidence' that the seller had 'knowledge of the obscene character' of the publication;

(b) the court below arbitrarily refused to instruct the jury that if the jury found that the petitioner had [fol. 184] a good faith belief that the publications involved were not obscene, then petitioner was entitled to an acquittal; and

(c) the court below arbitrarily excluded from consideration by the jury substantial evidence, both oral and documentary, showing that petitioner had no knowledge of the contents or of the alleged obscenity of the publications involved in the prosecution herein upon which the judgment of conviction against petitioner was rendered."

The case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Stewart are of the opinion that certiorari should be granted on all the questions presented by the petition.